DELAY WITHIN THE ADMINISTRATION OF JUSTICE IN PROCEEDINGS INVOLVING THE CARE, CUSTODY AND ACCESS OF CHILDREN

REPORT

March 6, 1995

DELAY WITHIN THE ADMINISTRATION OF JUSTICE IN PROCEEDINGS INVOLVING THE CARE, CUSTODY AND ACCESS OF CHILDREN

REPORT

MINISTRY OF THE
ATTORNEY GENERAL
LAW LIBRARY

March 8, 1995

KF
547
O57
1995

DELAY WITHIN THE
ADMINISTRATION OF JUSTICE
IN PROCEEDINGS INVOLVING
THE CARE, CUSTODY AND
ACCESS OF CHILDREN REPORT

INDEX

Page No.

FOREWORD vii

SUMMARY OF REPORT ix

SUMMARY OF RECOMMENDATIONS xvi

TWENTY ONE RECOMMENDATIONS xx

1. BACKGROUND 1

- Terms of Reference 1
- "Child Welfare System" and the "Administration of Justice" 1
- Delay 2
- Resources 3

2. INTRODUCTION 4

(a) Limbo 5
(b) Direction of the Child Welfare and Administration of Justice Systems 7
(c) Early Permanency Planning 7
(d) Children's Aid Societies Caught in the Middle 10
(e) Systems Outside the Child Welfare and Administration of Justice System 11
(f) Parallel Child Protection and Custody/Access Proceedings 11
(g) Approach to Recommendations 12

(i) Resources of Ministry of the Attorney General 12
(ii) The Word "Shall" in the Legislation Should Have Meaning 12
(iii) No Need to Re-Examine Policy Behind Enabling Legislation 13

3. DELAY 15

(a) Generally 15
(b) 1980 Tator and Wilde Study 15
(c) Ontario Court (General Division) March 1994 15
(d) Hamilton Unified Family Court February 1994 16
(e) Ontario Court (Provincial Division) Survey March, 1994 16
(f) 80% of CAS Caseload Not in Court Systems 17

4. *UNIFIED FAMILY COURT* 18

Recommendation #1 - Establishment of a Family Court in Ontario 18

5. *CIVIL JUSTICE REVIEW* 20

Recommendation #2 -Top Priority for Proceedings Involving Children 20

6. *CRIMINAL JUSTICE SYSTEM* 22

(a) Young Offenders 22
(b) Domestic Violence 24
(c) "Delay" - Askov 29

Recommendation #3 - Linkage With Criminal Justice System 29

7. *VOLUNTARY TEMPORARY CARE AGREEMENTS, WARDSHIP, SUPERVISION ORDERS, AND THE TWENTY FOUR MONTH RULE* 31

(a) Twenty-four Months of Continuous Care 31
(b) Series of Supervision Orders Beyond Twenty-four Months 33
(c) Change of Basic Direction 33
(d) Control of Orders for Continuous Care Outside Twenty-four Months 34

Recommendation #4 - Final Disposition for "Continuous Care" Children Before End of Twenty-four Month of Care 35

8. *COMMUNITY RESOURCES* 36

(a) Lists of Resources 36
(b) Resources Deployed Before Court Application 36

Recommendation #5 - Resources List 37

9. *ALTERNATE DISPUTE RESOLUTION* 38

(a) Alternate Dispute Resolution 38
(b) Settlement Negotiations 43
(c) Mediation 44
(d) Approval of a Judge 44

Recommendation #6 - Dispute Resolution and Settlement 45

10. *ASSESSMENTS* 47

(a) Assessments Generally 48
(b) Court Ordered Assessments 50
(c) "Issue Focused" Assessments 50
(d) Cost of Assessments 52
(e) Timeliness of Assessments 53
(f) Administration of Delivery of Assessments 53

Recommendation #7 - Assessment Reports 54

(g) Assessments at Interim Care and Custody Stage 54

Recommendation #8 - Amend s. 51 CFSA to Provide for Interim Assessment of "Substantial Risk" 59

11. *INTERIM TEMPORARY CARE AND CUSTODY ORDERS* 60

(a) Oral Evidence 60
(b) No Cross-Examination 61
(c) Case Conference 61

Recommendation #9 - Case Conference at First Court Appearance About Care and Custody of Child 62

12. *FINDING "IN NEED OF PROTECTION"* 63

(a) Fixing Date for Hearing 63
(b) Fix Hearing Date at First Case Conference 63
(c) Splitting the Hearing 64
(d) Hearing Within Five to Six Months 64
(e) Timing of Assessment Reports and Hearing Date 66
(f) Early Finding of "In Need of Protection" - Stigmatization 66
(g) In "Need of Protection" v. "Substantial Risk" 67

Recommendation #10 - Date of "Child Protection" Hearing Fixed at First Case Conference 69

13. *SOCIETY WARDSHIP* 70

(a) Each Case Requires a Special Remedy 70

(b) Meaningful Access/Supervised Access 71
(c) In Which Direction Should the Child Proceed? 72
(d) Status Review 73
(e) Foster Parents 74
(f) Change Direction Only Once 75

14. "BEST INTERESTS" TESTS 77

15. PLAN FOR CHILD'S CARE 81

(a) Purpose of Intervention 83
(b) Time to Achieve Purpose of Intervention 83

Recommendation #11 - Plan for Child's Care and Purpose of Children's Aid Society Intervention 84

16. EXPECTATIONS OF THE ADMINISTRATION OF JUSTICE TO REQUIRE ALL PARTIES TO COMPLY WITH THE LEGISLATED TIME ZONES 85

(a) Courts Are Last Resort 85
(b) The Legislated Time Zones 85

17. DOCUMENTATION AND IDENTIFICATION OF PARTIES 89

(a) Assistance to Parents Unrepresented by Counsel 89
(b) "Answer" to Child Protection Proceedings 90
(c) Identification of Parties 91
(d) Service of Documentation 91
(e) Discovery of Documentation 92

Recommendation #12 - Documentation, Disclosure, Necessary Parties, Pleadings and Independent Counsel, Need Early Clarification 92

18. ADJOURNMENTS AND THE LENGTH OF TRIALS 95

Recommendation #13 - No Adjournment of Trials Underway 96

19. CASE MANAGEMENT 97

(a) Pilot Case Management Projects 98
(b) Early Judicial Intervention 100
(c) Compel Decisions By Parties and Lawyers 100
(d) Protocol of Expectations 101
(e) Case Management and Technology at 311 Jarvis Street, Toronto 102
(f) "Co-Managers" 102

Recommendation #14 - Establish Ontario Case Management Advisory Committee ... 103

20. PROVINCIAL CONSISTENCY 104

21. PARALLEL PROCEEDINGS CFSA AND CLRA 105

22. OPEN ADOPTION 108

Recommendation #15 - Open Adoption Should be Reviewed 108

23. EDUCATION AND TRAINING 110

Recommendation #16 - Education and Training by Social Justice Services Division .. 110

24. ACCOUNTABILITY 111

(a) Judges 111
(b) Lawyers 112
(c) Official Guardian 112
(d) Ontario Legal Aid Plan 113
(e) Courts Administration 114
(f) Courts Management Advisory Committees 114

Recommendation #17 - Availability of Emergency Legal Aid 115

Recommendation #18 - Briefing of Courts Management Advisory Committees 115

25. STATISTICS *116*

Recommendation #19 - Develop Statistics For Management of Timeliness of Child Proceedings *116*

26. DIRECTORS' REVIEWS *117*

Recommendation #20 - Review Policy Behind Directors' Reviews *118*

27. DEVELOPMENTAL AGES AND STAGES OF CHILDREN *119*

Recommendation #21 - Amend s. 30 CFSA: Reduce Twenty-four Month Rule to Twelve Months for Children Age Three or Younger *120*

28. CONCLUSION *121*

ENDNOTES *124*

APPENDIX 'A' *126*

TERMS OF REFERENCE

APPENDIX 'B' *132*

MEMBERS OF THE COMMITTEE

FOREWORD

On January 26, 1995, Mr. Justice George Walsh of the Ontario Court (General Division), issued his reasons for judgment in a case (R. and G.L. v. The Children's Aid Society of Metropolitan Toronto, unreported) involving a three year old child who was apprehended by the Children's Aid Society when she was barely a month old. Justice Walsh said:

DELAY

Almost four years ago, Paisley J., in Children's Aid Society of the Region of Peel v. D.K. and S.K., unreported, observed:

> **"In this case, it seems to me an injustice has been done already to the child, to the parents of the child and to society, as the trial of this issue was delayed for 23 months. There is no explanation before me as to why that delay occurred, but even if it occurred on the consent of all parties, I can see no justification for an issue of this nature being delayed so long. If persons accused of criminal offences have a right to be tried within a reasonable time and if denied that right, the charges against such person must be stayed, how much more important is it for society to provide for the determination of issues of custody, a determination of what is in the best interest of a child within a reasonable period of time. I just don't see how one can equate the two questions without coming to the conclusion that society must provide for prompt determination of such issues."**

In C.M. v. Catholic Children's Aid Society of Metropolitan Toronto and Official Guardian, [1994] 2 S.C.R. 165, (1994) 2 R.F.L. (4th) 313, L'Heureux-Dubé J., speaking for the Supreme Court of Canada, stated at p. 347 (R.F.L.):

> "I share Macdonald J.'s concerns with regard to the importance of reaching a speedy resolution of matters affecting children. The Act requires it and common sense dictates it. A few months in the life of a child, as compared to that of adults, may acquire great significance. Years go by crystallizing situations that become irreversible. This is exactly what happened here."

L'Heureux-Dubé J. continues, at p. 349 (R.F.L.):

> "As I stated earlier, time is of the essence in proceedings concerning the welfare of children. Every effort should be made to accelerate hearings of these matters so as to minimize any prejudice to all parties and to avoid that a certain state of affairs occurs."

In this case, tragically but understandably, the trial judge misapprehended the true nature of the application after a hearing which consumed some 22 days of evidence at a trial spread over a period of 15 months, being a half-day here, another half-day perhaps a week later, then another half-day a few weeks later, then a month's delay, etc. with no two consecutive trial dates. Under these conditions, it is not difficult to see how one could easily be mistaken or uncertain as to crucial facts when a trial is truncated in this manner. At the trial, the examination and cross-examination of witnesses was stopped almost in mid-sentence not to be continued for days and, in some cases, weeks later.

In these circumstances, can justice possibly be done?

As Paisley J. observed, the accused in criminal proceedings has Askov to ensure an expeditious trial. Is it too much to ask that children share the same right in child protection hearings?

Sadly, the Court was advised that the delay and truncation of proceedings experienced here were not unique to this case.

Even in these times of restraint, those charged with the administration of the C.F.S.A. must ensure that sufficient judicial and administrative resources be provided so that child welfare trials can proceed expeditiously and on consecutive days. Surely, the children of this province are entitled to nothing less.

SUMMARY OF REPORT

Lethargy in the child welfare system and the administration of justice contributes to children drifting into limbo. Children need early permanency planning in their daily lives when they are removed by a Children's Aid Society from their families or their parents are separating.

The Child and Family Services Act and the Children's Law Reform Act, and the Divorce Act define the responsibilities and rights of parents, foster parents, Children's Aid Societies and children. The legislation provides for mandatory time zones in which final decisions about the future care and custody of children must be made. The "Askov" remedy of dismissing a criminal case not brought to trial within a reasonable amount of time is not in the best interests of children. For children, domestic violence, sexual abuse and emotional harm cannot be circumscribed by a rule of law.

The only way to combat delay within the administration of justice in child proceedings is to establish a "protocol of expectations" so that when a proceeding enters the administration of justice as a last resort (80% of the

Children's Aid Societies' caseload are not in the court system), all persons involved - parties, lawyers, court administrators, judges, social workers, health professionals, educators and assessors - will be expected to understand and comply with the time zones and procedures prescribed by the legislation, rules of practice, and practice directions.

In order to achieve provincial consistency about delay, it is imperative that the proposed Family Court of the Ontario Court (General Division) be established as quickly as possible throughout Ontario. By doing so, parallel civil proceedings under the legislation concerning children may be heard by the same case management and trial judges. It will allow the same judges to address more meaningfully, for example, the behaviour of young offenders in the Alternate Measures Program who commit less serious criminal offences. It will give the judges more alternatives to view the ability of parents or primary caregivers to respond to the needs of children who are climbing the disturbance scale. Police, crown attorneys, social workers, probation officers and lawyers who are involved with the same children need a greater awareness of the resources available in the criminal and family law justice systems. Written assessments and plans for a child's care required by the

legislation, should be shared as early as possible and understood so that decisions made by either system to separate children from their primary caregivers are made in their best interests. In short, it is not just a matter of delay - it is about permanency planning on behalf of children who fall into the criminal or social safety nets. They require an opportunity to grow and mature as children and youth.

Children's Aid Societies are caught in the middle of a duty to protect children from further abuse or neglect while, paradoxically, attempting to integrate children back into their families. It is a complex and difficult role. The Child and Family Services Act clearly states that a judge must make a final decision within twenty-four months from the apprehension of the child who has been in the continuous temporary care of the Society since apprehension (for children age three or younger, the Committee recommends that the time should be shortened to twelve months). Some professionals and judges are of the view that parents have twenty-four months to improve their parenting ability. This is a misunderstanding of the legislation.

The Committee recommends, therefore, that alternate dispute resolution

should begin before an application is launched without the involvement of lawyers and judges. When a proceeding is eventually launched, resolution should continue with settlement negotiations and, if agreed to, mediation. In this way the acrimony and stigmatization of the parties should be reduced to a minimum so that they may concentrate upon the needs of their child and their abilities to fulfil those needs.

In order to expedite the procedure, the Committee recommends the early identification of the necessary parties and service of court documents upon them, the filing of an "Answer" in child protection cases, a full exchange of information and documentation, limitation of cross-examination and oral discovery, and the early appointment of independent counsel for parties and the child. These steps require clarification at the first case conference chaired by a judge on the first return date to court of the application or shortly thereafter. If settlement negotiations in the case management judge's opinion are productive, adjournments limited to no more than thirty to sixty days may be given. Once a hearing about whether a child is "in need of protection" or about the temporary or final disposition of the future care and custody of a child begins, the hearing should be concluded without any adjournments.

To assist judges in making some of the most difficult decisions they will ever face, they require an interim assessment to determine whether a child is at "substantial risk" at the time of making an interim care and custody order. They also need written child care plans and a clear statement about the purpose and timing of any intervention by a Children's Aid Society or custodial parent attempting to curtail access by a child to a parent.

The Committee is also of the view that a further in depth review is needed about the administration and timeliness of the delivery of Assessment Reports. The qualifications of assessors, the fees charged by them, and how those fees should be shared out of public funds among the public institutions i.e., the Official Guardian, the Ontario Legal Aid Plan and the Children's Aid Societies, involved on behalf of children and the parties should be carefully studied.

In child protection proceedings the date for the hearing as to whether a child is "in need of protection" should be fixed at the first case conference. The "in need of protection" hearing itself should be held as quickly as possible so that evidence heard later, including a full Assessment Report (which cannot

be ordered until such finding), will be available at a subsequent disposition hearing. The disposition hearing should be held within five to six months from the apprehension of the child. If the disposition order does not return the child home without a supervision order, i.e., terminating a Society's involvement, or does not declare the child to be a Crown Ward without access, i.e. the child may be adopted, then there should be no more than two status reviews to achieve permanency in the child's life.

Supervision orders and society wardship orders are temporary measures on the road to making a final disposition within the twenty-four months allowed for a child in the continuous care of a Society. The Committee suggests, therefore, that, as a matter of principle, the basic direction in which a child is headed can only be changed once to comply with the legislated time zones.

Simply stated, the "best interests" tests of the legislation require early permanency planning for children.

Everyone involved with children contributes to the delay in reaching decisions about children. In addition to the courts establishing a "protocol of

expectations", up-to-date lists of the available resources in the province, expanding the supervised access program, issue focused assessments, technology assisted case management, accountability, and better training and education, are also needed to assist the decision makers, including judges, to make earlier and meaningful decisions about the future care, custody and access of children in limbo.

SUMMARY OF RECOMMENDATIONS

FAMILY COURT

1. *Establish a unified Family Court of Ontario throughout the Province.*

PRIORITY

2. *Top priority should be given in the administration of justice to cases involving the care, custody and access of children.*

CRIMINAL JUSTICE SYSTEM

3. (a) *The cases of young offenders who qualify for the Alternate Measures Program should be dealt with by the new Family Court.*

   (b) *A protocol should be established between the criminal and family law justice systems to deal with criminal cases involving domestic violence withdrawn by the Crown.*

TWENTY-FOUR MONTH RULE

4. *The Rules of Practice should support the final disposition of child protection cases within twenty-four months of apprehension for children in continuous temporary care.*

RESOURCES LIST

5. *Resources for families in crisis in Ontario should be identified, listed and monitored by the Official Guardian.*

DISPUTE RESOLUTION AND SETTLEMENT

6. A new section of the Child and Family Services Act is needed to encourage voluntary dispute resolution in child protection proceedings and a judge should approve any settlement.

ASSESSMENTS

7. The frequency and value of Assessment Reports should be reviewed.

INTERIM ASSESSMENT OF "SUBSTANTIAL RISK"

8. Section 51 of the Child and Family Services Act should be amended to require an interim assessment when a Children's Aid Society requires more than thirty days from apprehension to decide whether a child should return home or not.

CASE CONFERENCE

9. A conference of the parties, counsel and the judge is needed at the beginning of the cases and no cross-examination should be allowed on the affidavits and documentation without the permission of the court.

DATE OF "CHILD PROTECTION" HEARING

10. The trial date for hearing whether a child is "in need of protection" should be fixed at the first case conference and proceed no later than 30 to 60 days after the child's apprehension.

PLAN FOR CHILD'S CARE

11. The Rules of Practice should require the filing of a written plan for the child's care (and the purpose of a CAS intervention) at the earliest possible moment.

DOCUMENTATION AND ANSWER

12. An Answer should be filed by parents in child protection hearings and all documentation should be reviewed in the court at an early case conference.

TRIAL

13. Once a care, custody and access trial begins, it should be finished and not adjourned.

ONTARIO COURT MANAGEMENT ADVISORY COMMITTEE (CIVIL AND FAMILY)

14. The Ontario Case Management Advisory Committee (Civil and Family) should be established.

OPEN ADOPTION

15. Open adoption should be studied by the Ontario Law Reform Commission.

EDUCATION AND TRAINING

16. The Social Justice Services Division of the Ministry of the Attorney General should coordinate education and training about the care, custody and access of children.

LEGAL AID-EMERGENCY ADVICE

17. The use of "green forms" (emergency four hours family law advice) should be expanded to all of the province.

BRIEFING OF COURTS MANAGEMENT ADVISORY COMMITTEES

18. The nine Courts Management Advisory Committees should be briefed about these Recommendations.

STATISTICS

19. Detailed statistical information about the steps and timeliness of cases involving children should be developed by the Courts Administration Division of the Attorney General.

DIRECTORS' REVIEWS

20. The policy behind Directors' Reviews should be reviewed.

CHILDREN AGE THREE OR YOUNGER

21. Section 70 of the Child and Family Services Act should be amended to reduce the twenty-four month rule to twelve months for children apprehended at age three or younger.

RECOMMENDATIONS

The Committee makes the following twenty-one Recommendations:

RECOMMENDATION #1

Establishment of a Family Court in Ontario

(a) *That after consultation with the Chief Justice of the Ontario Court (General Division) and the Minister of Justice, the sections of the Courts of Justice Statute Law Amendment Act, 1994 relating to the first Family Court of the Ontario Court (General Division) should be proclaimed immediately at locations to be identified by the Attorney General.*

(b) *That a plan be published by the Attorney General in conjunction with the Minister of Justice to amend to the federal Judges Act so that more federal judges may be appointed and, within three years, to implement throughout all of the province the phases and locations of the new Family Court .*

(c) *That the Attorney General in conjunction with the Minister of Justice identify how the resources not expended as a result of shifting provincial budgeted expenditures to the federal budget, should be budgeted by the Courts Administration Division of the Ministry to support the recommendations in this Report.*

(d) *That the Attorney General direct the Assistant Deputy Attorney responsible for the Courts Administration Division to identify the resources now being expended upon all family law issues within both the General Division and*

Provincial Division of the Ontario Court so that there is an expenditure threshold established against which any savings achieved as a result of the unification of all family law issues are designated and directed into the new Family Court. This initiative should be undertaken immediately and receive the pre-authorization of Management Board Secretariat.

RECOMMENDATION #2

Top Priority for Proceedings Involving Children

(a) *That the Civil Justice Review consider the Recommendations in this Report about delay in private custody and access proceedings so that the Attorney General ultimately receives a consistent set of recommendations.*

(b) *That during the implementation of the unification of all family law issues within the new Family Court, the Attorney General advocate to the Ontario Courts Management Advisory Committee and to the Regional Courts Management Advisory Committees, the importance of addressing the issue of children in limbo in all proceedings involving their future care and custody, and to request that such cases be given top priority by all Regional Senior Judges within both Divisions of the Ontario Court of Justice ahead of all other family law cases and all other civil law cases.*

RECOMMENDATION #3

Linkage with Criminal Justice System

(a) *That the cases of those young offenders who qualify for the Alternate Measures Program be dealt with by the judges of the new Family Court of the Ontario Court (General Division).*

(b) *That the Attorney General direct the Assistant Deputy Attorney General (Criminal) to establish a protocol with the Ministries of Community and Social Services and Solicitor General so that all domestic violence charges involving sexual, physical or emotional abuse of children which are not prosecuted by reason of insufficient evidence, are referred to the local Children's Aid Society. All information gathered by police officers and the crown about the criminal charges should be forwarded to the attention of the responsible Children's Aid Society for investigation under the Child and Family Services Act. The protocol should also provide a clear understanding as to whether under any circumstances, criminal mischief charges will be laid against children who recant.*

(c) *That the Attorney General direct the Assistant Deputy Attorney General (Criminal) to give top priority to the scheduling of the prosecution by Regional Crown Attorneys of domestic violence and child abuse charges, and that such cases be heard second only to bail hearings for prisoners in custody.*

RECOMMENDATION #4

Final Disposition for "Continuous Care" Children Before End of Twenty Four Months of Care

That the Rules of Practice in all applications under the Child and Family Services Act, provide that Children's Aid Societies should indicate the date of the first temporary care agreement and the date of apprehension of a child. The Rules should also provide that if any application is less than 158 days from the expiry of twenty-four months from the first date the child has been in the continuous care of the Society, the case should be placed on a special court list so that a final order will be made by the court before the end of the twenty-four month period.

RECOMMENDATION #5

Resources List

That the Official Guardian, in conjunction with the Ministries of Health, Education, Community and Social Services and Attorney General, prepare a detailed list of the services providing expertise and skills families in crisis. The list should be distributed widely within local communities, to lawyers, judges, courts administration staff, teachers and health professionals, and should be regularly monitored and updated by the Official Guardian.

RECOMMENDATION #6

Dispute Resolution and Settlement

(a) *That the Attorney General make resources available to the new Social Justice Services Division of the Ministry of the Attorney General to establish a protocol among the Children's Aid Societies, local resources, and the administration of justice to promote and encourage the establishment and monitoring of voluntary dispute resolution at the commencement of an application, statement of claim or petition for divorce in proceedings which involve the future care, custody and access of children.*

(b) *That the Attorney General request the Minister of Community and Social Services to enact a section in the Child and Family Services Act to provide a structure for dispute resolution in a wording similar to s. 31 of the Children's Law Reform Act and that both Ministries share the funding of such services on a formula to be agreed upon by them.*

(c) *That the Rules of Practice should include a rule that all settlements in proceedings involving the care, custody and access of children, be considered by a judge for approval or at least when a child has been apprehended by a Children's Aid Society in a child protection proceeding.*

RECOMMENDATION #7

Assessment Reports

That the Social Justice Services Division of the Ministry of the Attorney General

review with Ontario Association of Children's Aid Societies, the Ministry of Community and Social Services, the Ministry of Health and the Ontario Legal Aid Plan, the frequency and value of Assessment Reports, the regulations, standards, qualifications and training of assessors, the fee structure that should be paid to them out of public funds, and the manner in which the fees should be shared by the public institutions involved.

RECOMMENDATION #8

Amend s. 51 CFSA to Provide for Interim Assessment of "Substantial Risk"

That the Attorney General request the Minister of Community and Social Services to amend s. 51 of the Child and Family Services Act so that when a Children's Aid Society requires more than thirty days from apprehension to decide whether a child should or should not be returned home with or without supervision, a court may order the Society to serve and file an interim assessment report by a professional assessor within thirty days of the said order.

RECOMMENDATION #9

Case Conference at First Court Appearance About Care and Custody of Child

That the Rules of Practice include a rule requiring a case conference of the parties at the first court appearance or shortly thereafter to determine the

interim temporary care and custody of a child and that, except by leave of the court, no cross-examination be allowed on the affidavits and supporting documentation filed at that time.

RECOMMENDATION #10

Date of "Child Protection" Hearing Fixed at First Case Conference

That the Rules of Practice include a rule requiring that the date for the hearing as to whether a child is "in need of protection" be fixed at the first case conference and proceed no later than thirty to sixty days after apprehension.

RECOMMENDATION #11

Plans for Child's Care and Purpose of Children's Aid Society's Intervention

That the Rules of Practice include a rule authorizing case management judges to require at the earliest possible moment the filing of written child care plans by the parties and, as well, in child protection cases, a written statement about the purpose of a Children's Aid Society's intervention.

RECOMMENDATION #12

Documentation, Disclosure, Necessary Parties, Pleadings, Discovery and Independent Counsel, Need Early Clarification

(a) *That the Rules of Practice should require an early case conference involving the parties and their counsel to review all documentation required by the court*

for a full disposition of the proceedings and to determine whether all parties have been properly identified and served with the application and supporting documentation.

(b) *That in child protection proceedings, the Rules of Practice should include a requirement that all parties in opposition to the applicant, prepare, serve and file within ten days of service of the application, an Answer or response to the allegations in the application. The legal consequences for failing to do so should be the same as those found in custody and access cases.*

(c) *That the Rules of Practice in both custody/access and child protection proceedings should provide for the earliest and fullest exchange of information among the parties and not allow for formal discovery under oath of the parties except with leave of the case management judge.*

(d) *That the Attorney General direct the Assistant Deputy Attorney General (Courts Administration) to educate and train administrative staff at the court locations where court documents are issued and filed, about the requirements expected of parties and their counsel to comply with the Rules of Practice and practice directions issued by the courts. They should recommend to parties who are unrepresented by counsel to retain health professionals and others who are skilled at assessment, mediation, and alternate dispute resolution, and to seek out independent counsel of their choice through the Law Society of Upper Canada referral service and the Ontario Legal Aid Plan, including, on an emergency basis, lawyers who accept a "green form" for four hours of legal*

advice without the necessity of qualifying for a legal aid certificate.

RECOMMENDATION #13

No Adjournment of Trials Underway

That the Chief Justice of the Ontario Court (General Division) and the Chief Judge of the Ontario Court (Provincial Division) schedule the rotation of judges hearing family law cases throughout the province so that once a trial about the care, custody and access of a child commences, it is finished and not adjourned for further evidence at later date.

RECOMMENDATION #14

Establish Ontario Case Management Advisory Committee (Civil and Family)

That the Chief Justice of the Ontario Court (General Division) and the Chief Judge of the Ontario Court (Provincial Division) and the Attorney General establish the Ontario Case Management Advisory (Civil and Family) to develop case management for all family law cases throughout the Province of Ontario.

RECOMMENDATION #15

"Open Adoption" Should be Reviewed

That the Ontario Law Reform Commission in its review of the Child and Family Services Act, study the issue of "open adoption" and make a recommendation to the Attorney General about whether the Act should be

amended to recognize the need for "open adoption" in special circumstances such as when an older child who has specific positive memories of his or her natural parents, requires access to them to retain cultural ties or to diminish any further behavioral symptoms which prevent the healthy maturation of the child.

RECOMMENDATION #16

Education and Training by Social Justice Services Division

That the Attorney General provide resources to the new Social Justice Services Division to coordinate and provide to all persons involved in the delivery of services in the child welfare and administration of justice systems, adequate and regular educational and training programs to be delivered by public and private institutions in the fields of law, health, education and social services.

RECOMMENDATION #17

Availability of Emergency Legal Advice

That the Ontario Legal Aid Plan consider expanding the use of "green forms" to other areas of the province so that more members of the public are able to have access to emergency legal advice about family law.

RECOMMENDATION #18

Briefing of Courts Management Advisory Committees

That the Ontario Courts Management Advisory Committee and the Regional Courts Management Advisory Committees be briefed about the Recommendations in this Report and be requested by the Attorney General to give clear guidance, advice and direction to the proposed Ontario Case Management Advisory Committee (Civil and Family) and to local case management and court liaison committees about the Recommendations in this Report.

RECOMMENDATION #19

Develop Statistics for Management of Timeliness of Child Proceedings

That the Attorney General provide resources to the Assistant Deputy Attorney General (Courts Administration) to develop computer programming which will provide detailed information in a statistical form for the management and analysis of the steps and timeliness of proceedings involving the care, custody and access of children.

RECOMMENDATION #20

Review Policy Behind Directors' Reviews

That the Attorney General consult with the Minister of Community and Social Services about the policy behind Directors' Reviews and whether one of the

recommendations should be that they should be conducted within the administration of justice.

RECOMMENDATION #21

Amend s. 30, CFSA: Reduce Twenty-Four Month Rule to Twelve Months for Children Age Three or Younger

That the Attorney General request the Minister of Community and Social Services to amend s. 70 of the Child and Family Services Act to reduce the twenty-four month rule to twelve months for children apprehended at age three or younger.

DELAY WITHIN THE ADMINISTRATION OF JUSTICE IN PROCEEDINGS INVOLVING THE CARE, CUSTODY AND ACCESS OF CHILDREN

1. BACKGROUND

- **Terms of Reference**

By Terms of Reference (see Appendix 'A') established by the Deputy Attorney General, George Thomson, in March 1994, the Committee (see Appendix 'B') reviewed the Official Guardian's Background Paper of June 1, 1994 and met for two days on June 27 and 28, 1994 with a set Agenda. Since then, the Committee reviewed and commented upon drafts of this Report and has reached a consensus. This Report is the result of those deliberations.

- **"Child Welfare System" and the "Administration of Justice"**

The "child welfare system" in this Report refers to those professional services delivered to protect children from abuse and neglect by caregivers while, paradoxically, offering services to integrate children with their families. The "administration of justice" refers to those systems in the courts which address, in accordance with the law, the

public responsibilities of the Children's Aid Societies and the rights and responsibilities of parents or primary caregivers to children.

Involved in both systems are lawyers and social workers who work with Children's Aid Societies, parents and children. Integral to the process are the judges of the courts and the staff of the Courts Administration Division of the Ministry of the Attorney General in both the Ontario Court (General Division) for some private custody and access disputes and the Ontario Court (Provincial Division) for child protection cases and custody and access actions.

- **Delay**

Each person in both systems, in one way or another, contributes to delay. Each of them possesses the power to reduce delay. For example, parents may delay proceedings by not obtaining counsel in a timely manner or failing to attend at assessment appointments; lawyers may not be prepared for a motion or trial; Children's Aid Societies may not identify all necessary parties or serve documents in a timely manner on all parties; judges may adjourn trials without concluding the evidence and submissions of counsel; and court administrators may not be able to identify proceedings which have exceeded the time zones of the legislation.

- **Resources**[1]

Some dysfunctional families are unable to improve their behaviour pattern to respond to a Children's Aid Society's apprehension of their child and to a finding of "in need of protection" within the legislated time zones. The end result of this Report may be to concentrate on speedily resolving these cases in the courtroom without the availability of the necessary additional mediation, assessment, social work and judicial resources recommended by this Report. To rush cases forward to trial without these resources will engender feelings of unfairness about the legal system by the family members it is supposed to be assisting. In the end more cases will be contested; the courts will be overwhelmed and further delays will be unavoidable. The challenge, therefore, in both systems is to deploy the needed resources so that these cases are resolved or tried in an expeditiously fair way on behalf of children in limbo.

2. INTRODUCTION

The most difficult cases involving children inevitably find their way into the courts. Some children are the victims of sexual abuse or neglect; some become young offenders; others are the focus of contests in child protection and custody and access disputes.

A neglected or abused child may be removed permanently from one or more primary caregivers. Hearings will be held in court about how to protect the child and whether to re-unite the family in the "best interests" of the child. However, the courts are not social service agencies. Judges are concerned with jurisdiction, evidentiary proof, legal principles and *stare decisis* to guide their decisions and to provide uniformity within the law across Ontario.

Over the last thirty years, family law has been at the centre of reform in the administration of justice. Professional assessments, offers to settle, pre-trials, and case management have been pioneered in the family courts. Techniques practised by health and social work professionals balance the rights, responsibilities, needs and abilities of the child and the family. Both systems have worked together so

that children will have a better chance in life to raise their own children.

With such a positive history of innovative reform, the Committee believes that all professional persons involved with children in the administration of justice and the child welfare system can improve the timely deployment of existing resources. Procedural reform is needed so that cases involving children are expeditiously resolved. Last year, the Supreme Court of Canada commented upon the heavy burden for children, their families and foster parents caused by the *lethargy of the legal process* in deciding the future care and custody of children[2]. The Committee agrees. Delay is found in *both* systems.

(a) ***Limbo***

Health care professionals involved in assessments, therapy and mediation, advise that the problem in both systems is that children are being allowed to drift too long into limbo. Limbo is defined as:

> **Limbo is a prolonged period of separation of a child from nurturing parents, in which there is persistent confusion, conflict or uncertainty about future plans, parenting authority, family relationships and past history. Most children in limbo are in the care of a child welfare agency and are placed in foster homes or staff-operated settings[3].**

Dr. Jim Wilkes, a well known and respected child psychiatrist, says that long term limbo must be avoided. He explains:

> **The destructive effects of the limbo situation make it more and more difficult for permanent plans to be effective. For example, it takes remarkable parents to adopt a child who has been in limbo a long time. The tendency to develop asocial and antisocial personality traits, and the propensity for difficult behaviour, make it more likely that the child cannot be held in a sustained placement. If adoption is attempted, there is a strong likelihood that the process will not go through to completion. A child who has difficulty forming attachments is not likely to provide parents with a sense of satisfaction.**
>
> **The nature of problem behaviour is that it does not change easily. Everyone agrees about this, yet the common desire that the difficult behaviour change often gets translated into determination that the difficult behaviour will change. The truth is that only one person can change the difficult behaviour of a child, and that person is the child. For most children in limbo, their difficult behaviour is their way of expressing who they are, and strong attempts to change the behaviour are experienced as attempts to change their persons. Their behaviour then becomes their heroic struggle to survive.**
>
> **Long-term limbo makes it increasingly difficult for the child to sustain permanent placement and relationship. As a result, most children who have had a prolonged limbo experience end up in a**

series of settings such as foster homes, group homes and treatment centres[4].

The Committee was advised that as long as the child does not feel abandoned, the time necessary to therapeutically help the family and the child does not contribute to limbo. In other words, the child, when in the temporary care of another person, must feel a real connection through meaningful access visits with a primary caregiver or parent.

(b) Direction of the Child Welfare and Administration of Justice Systems

The direction and focus of the child welfare and administration of justice systems appear unclear. They seem to be in some difficulty as to how to communicate with each other effectively on behalf of children in limbo. Lethargy and limbo, the Committee believes, are found in both systems.

(c) Early Permanency Planning

In their presentation to the Committee, both Dr. Paul Steinhauer, a pioneering child psychiatrist, and Dr. Wilkes, emphasized the importance of early permanency planning:

- Permanent damage to a child in limbo occurs when the child assumes or feels *permanently* abandoned.

- **Immediately after removal from the primary caregiver, the child should know and understand who is making what decisions on behalf of the child.**
- **The process of preparing a *permanent* child care plan should begin immediately upon apprehension.**
- **The substitute caregiver should be extremely sensitive to the child's sense of grief or mourning for the loss of the primary caregiver, and, depending upon the child's ability to understand, the child should be given accurate information and be involved in planning his or her future. For instance, if it is reasonable to consider moving the child back home eventually, the child should be prepared for a return home and have meaningful access to the primary caregiver. Joint attachment to both natural and foster parents is feasible and workable in many cases. If, on the other hand, it is intended or expected that the child should be adopted, it must be done quickly.**
- **The younger the child, the more important it is to maintain the child's psychological bond with the child's natural parents or to quickly sever it and develop a bond with foster parents.**
- **Older children with memories of their parents which are not frightening or depressing, probably should have access to them even when adopted.**

- **Children's Aid Societies should investigate quickly whether the child's parents will accept responsibility and whether, from their history and potential abilities, they will be responsive to their child's needs. Do they, for example, suffer from a psychiatric disability or addiction which may limit their perceptions of their child's needs and their own ability to meet those needs? The key element is for the Society to make a decision about the child's future care as early as possible.**
- **The child needs a real sense of *permanency* as early as possible in the process.**
- ***The decision makers and the courts should not allow the application of the"least intrusive" principle to interfere with early, clear decisions about permanency planning.***
- **Permanency planning does not necessarily mean planning for adoption.**
- **Children *know* when they are being cared for and it does not matter whether the plan is called adoption or foster care with or without access to the child's natural parents or primary caregiver.**

(d) Children's Aid Societies Caught in the Middle

Children's Aid Societies, therefore, are caught in the middle of a dispute at law between the rights of parents (and the societal value of maintaining the family unit) and the best interests of and permanent planning for the child. Some service providers in the child welfare system are of the opinion that the pendulum has swung too far in the direction of parents' rights and blame the administration of justice. They are of the firm view that the legislation should be changed.

Other professionals believe that the legislation should be changed because the declaration of principles and the definitions of "in need of protection" and "best interests" of the child are contradictory and too complex to understand and interpret. They suggest that the legislation should be changed so that the decisions made on behalf of a child are based upon a more simplified, less complicated legislative foundation. Some members of the Committee are of the opinion that the Ministry of Community and Social Services should directly provide the services necessary in the child welfare system rather than supervising the delivery through independent Children's Aid Societies which, they argue, are insufficiently resourced to do so.

(e) Systems Outside the Child Welfare and Administration of Justice Systems

Outside the two systems, other systems contribute to limbo and lethargy. The handling of young offenders, domestic violence and delay within the parallel criminal justice system, influence the capability of both the child protection and administration of justice systems to resolve problems on behalf of children. The mental health and educational systems offer explanations, advice and directions to families and their children embroiled in crises. They, too, are important agents of change on behalf of children; sometimes, they contribute to delay within the court process. Each system has impediments within areas of responsibility and a scarcity of resources to provide timely services.

(f) Parallel Child Protection and Custody/Access Proceedings

The public child protection system under the Child and Family Service Act (CFSA) is different from the family law system which adjudicates private custody, support and access disputes under the Children's Law Reform Act (CLRA), the Family Law Act and the Divorce Act. Children do not know about the differences found in the enabling legislation. Limbo and lethargy in both legal systems have the same profound consequences for children; they still feel the grief and

uncertainty arising out of the facts. They desperately need early permanency planning. When both child protection and custody/access proceedings are instituted at the same time, the timeliness and effectiveness of early decision making on behalf of the child becomes more problematic.

(g) Approach to Recommendations

(i) Resources of Ministry of the Attorney General

The Committee has attempted to confine itself to making recommendations limited to the resources of the Ministry of the Attorney General. Except for Recommendation #6 (b) about dispute resolution and Recommendation #8 about requiring an interim assessment report, the Committee has not made any recommendations which have a direct impact upon the resources committed by the Ministry of Community and Social Services to the fifty-five Children's Aid Societies in Ontario.

(ii) The Word "Shall" in the Legislation Should Have Meaning

After carefully reviewing the enabling legislation, the Committee has concluded that the expectations found in the words of the statutes - primarily the use of the word "shall" - should be given real meaning. The goal of not allowing children to drift too long into limbo, must be

the goal of both the child welfare and administration of justice systems.

(iii) No Need to Re-Examine Policy Behind Enabling Legislation

The Committee also discussed how well the enabling legislation is meeting the needs of children who fall into the safety net of the legislation. When considering the quasi-criminal approach of the CFSA with its focus upon parental abuse and neglect, some Committee members questioned whether other types of non-adversarial processes should be recommended to resolve the disputes. For example, it was suggested that a tribunal of health and education professionals should be established to resolve issues at the outset of a dispute and that only unresolved cases should be forwarded for a hearing by a judge.

However, in light of the Terms of Reference and the advice of the former Deputy Attorney General, George Thomson, the Committee is of the opinion that it would be difficult to obtain a thorough review of the CFSA by the Ministry of Community and Social Services within the next few years. Except for Recommendations #6 (b), #8 and #21, the Committee, therefore, has consciously avoided making recommendations calling for the amendment of the legislation. The Committee is also of the opinion that it is not necessary to re-examine the policy behind the enabling legislation. Insofar as the Charter of

Rights and Freedoms is concerned, the legislation itself appears to provide a judicious balance among the responsibilities and rights of Children's Aid Societies, the child, the child's parents and caregivers.

3. DELAY

(a) Generally

Caselaw reveals that the custody/access and child protection legal systems appear to be taking too long to resolve the responsibilities and rights of the parties and children. The systems appear to be unable to concentrate upon the individual child in limbo. In essence, the direction of both systems is not as child focused as it should be despite the mandatory time zones in the legislation.

(b) 1980 Tator and Wilde Study[5]

The Tator and Wilde study of 1980 found that the *average* child protection case required 454.3 days for disposition. Some cases took longer than twenty four months, or 730 days, for a child to become a society ward, which is the *longest* time permitted under s. 70 of the Child and Family Services Act.

(c) Ontario Court (General Division) March 1994

Statistics in the Ontario Court (General Division) (not including divorce cases) reveal that of the Family Law/Children's Law cases on the ready list for trial as of March 31, 1994, 31.9% were over a year old; 26.2% were six months to one year old; and 41.9% under six months. It

is significant that these statistics do not include the passage of time from the commencement of proceedings to the time they are placed on the ready list for trial.

(d) Hamilton Unified Family Court February 1994

In the Hamilton Unified Family Court for the month ending February 28, 1994, there were 104 family cases set for trial for a specific week, requiring 313.75 trial days. Nineteen additional child protection cases set for trial required 104 estimated trial days. A three day child protection trial could be heard in Hamilton five to six months after being set for trial. There were no statistics available to indicate exactly how long it took before those cases were "ready" or set for trial.

(e) Ontario Court (Provincial Division) Survey March, 1994

Acting Associate Chief Judge Grant A. Campbell and Judge Wilma Scott advised the Committee that a questionnaire survey was answered in March 1994 by the judges of the Provincial Division who preside over family law and child welfare cases. Although the length of delay varied among court locations in the province, a short trial (one day or less), was heard within two to eight weeks from the time a trial was requested, i.e. after all preliminary matters such as assessments, discoveries and pre-trials had been completed. For a

assessments, discoveries and pre-trials had been completed. For a longer trial, trial days were spread over a multitude of single or double days until the trial was completed.

The survey also revealed that the length of delay for longer trials varied considerably from 60 days to 259 days from the time of request. Apparently, the hearing of longer trials was dependent upon the availability of "visiting judges" especially in single judge locations. The survey concluded that there was a minimum of 825.5 days of trial time outstanding in the province as at March 1994 for trials estimated to last two or more days. The result was that in the Provincial Division where all of the child protection cases and many custody/access cases are heard, the longer the estimated length of a trial, the longer the delay expected in achieving a final disposition.

(f) <u>80% of CAS Caseload Not in Court System</u>

So that the delay in child proceedings is put into some perspective, Joan Belford (the Committee's representative from the Policy and Program Development in Child and Family Services at the Ministry of Community and Social Services) advised the Committee that of all investigations conducted by Children's Aid Societies, approximately 80% of them are resolved *before* a CFSA application is made to court.

4. UNIFIED FAMILY COURT

The obvious long term success of the Unified Family Court in Hamilton where all family law issues are gathered into one court, should inspire the Ministry of the Attorney General to expedite the formation and administration of the proposed Family Court of the Ontario Court (General Division) across the province. It is clear to the Committee that the new family court will deal more expeditiously with all proceedings involving children.

RECOMMENDATION #1

Establishment of a Family Court in Ontario

(a) That after consultation with the Chief Justice of the Ontario Court (General Division) and the Minister of Justice, the sections of the Courts of Justice Statute Law Amendment Act, 1994 relating to the first Family Court of the Ontario Court (General Division) should be proclaimed immediately at locations to be identified by the Attorney General.

(b) That a plan be published by the Attorney General in conjunction with the Minister of Justice to amend to the federal Judges Act so that more federal judges may be appointed and, within three years, to

implement throughout all of the province the phases and locations of the new Family Court .

(c) That the Attorney General in conjunction with the Minister of Justice identify how the resources not expended as a result of shifting provincial budgeted expenditures to the federal budget, should be budgeted by the Courts Administration Division of the Ministry to support the recommendations in this Report.

(d) That the Attorney General direct the Assistant Deputy Attorney responsible for the Courts Administration Division to identify the resources now being expended upon all family law issues within both the General Division and Provincial Division of the Ontario Court so that there is an expenditure threshold established against which any savings achieved as a result of the unification of all family law issues are designated and directed into the new Family Court. This initiative should be undertaken immediately and receive the pre-authorization of Management Board Secretariat.

5. CIVIL JUSTICE REVIEW

A Civil Justice Review co-chaired by Mr. Justice Robert Blair of the Ontario Court (General Division) and Ms. Sandra Lang, Assistant Deputy Attorney General (Courts Administration), is addressing, among other issues, delays within the entire civil law system. The review is considering delays in family law matters such as property rights disputes and financial support of dependant children and spouses; it is not considering the timeliness of cases involving care, custody and access of children in the Ontario Court (Provincial Division).

RECOMMENDATION #2

Top Priority for Proceedings Involving Children

(a) That the Civil Justice Review consider the Recommendations in this Report about delay in private custody and access proceedings so that the Attorney General ultimately receives a consistent set of recommendations.

(b) That during the implementation of the unification of all family law issues within the new Family Court, the Attorney General advocate to the Ontario Courts Management Advisory Committee and to the

Regional Courts Management Advisory Committees, the importance of addressing the issue of children in limbo in all proceedings involving their future care and custody, and to request that such cases be given top priority by <u>all</u> Regional Senior Judges within <u>both</u> Divisions of the Ontario Court of Justice ahead of all other family law cases and all other civil law cases.

6. CRIMINAL JUSTICE SYSTEM

The Committee noted the obvious connection between the criminal law justice system and family law issues involving the future care, custody and access of children.

(a) Young Offenders

There are thousands of cases under the Young Offenders Act concerning children and youth between the ages of twelve to eighteen. They may or may not be guilty of a criminal offence proven "beyond a reasonable doubt". They, also, may or may not be "in need of protection" under s. 37 (CFSA), proven on the lower standard of proof, "the balance of probabilities". In both systems, the result for the child may be the same - temporary or permanent separation from his or her family.

Both systems have a different methodology and culture within the administration of justice. This is reflected in the administrative separation of the Civil Law Division from the Criminal Law Division of the Ministry of the Attorney General and, indeed, the recent creation of a new Division, the Social Justice Services Division[6] which serves children and vulnerable adults. The Law Society of Upper

Canada recognizes the specialization of lawyers in criminal law, civil litigation, and in family law. To some extent these specializations are also reflected in the judges presiding in the General and Provincial Divisions of the Ontario Court of Justice.

Since the enactment of the Young Offenders Act in 1984, the Ministry of the Attorney General's approach to the conduct of children in the criminal justice system has been to determine "guilt" or "innocence" rather than providing alternate measures to the child prior to such a finding. This issue was studied by the Ministry's Office of Youth Justice and recommendations were made recently by the Attorney General to establish an Alternative Measures Program for less serious offenses. It is hoped that this approach which is supported by the Minister of Justice and other professionals in the field, will concentrate upon children who do not commit violent or serious crimes.

It would be helpful to implement the Alternate Measures Program by integrating the child welfare and probation services of the Ministry of Community and Social Services. In essence, the limited resources committed by both the federal and provincial governments to the incarceration of young offenders under the Young Offenders Act

would be better utilized in the child welfare system so that behavioral problems will be addressed earlier in the child's life. Overall, the Committee is of the view that the criminal justice and family law systems do not have procedures and protocols in place to co-ordinate the proper and expeditious decision making on behalf of children who commit less serious crimes.

(b) Domestic Violence

Domestic violence is another important example of the connection between the criminal justice and family law systems. Domestic violence is experienced in one way or another by all members of a family. The criminal justice system, police forces, the child welfare system and health professionals are far more aware today of the importance of addressing such behaviour. Charging offenders and imposing criminal sentences and sanctions upon violent family members set an example to children and others. It may reduce the immediate and generational repetition of such behaviour. This approach has been a central initiative of the Ministry of the Attorney General for over ten years. Experts warn, however, that pure punishment is not sufficient in itself; counselling and treatment are needed as well.

If an accused family member is found "not guilty" by the legal standard of "beyond a reasonable doubt", it does not mean that the accused has not actually committed an assault that could have been established "on the balance of probabilities" required by the civil law. There is an opinion held by some health and social work professionals that when an accused admits to being violent or is found guilty in a criminal proceeding, it becomes easier to address family dysfunction within the family law system. Upon an admission or conviction, it becomes easier to construct a meaningful order in child protection and custody/access proceedings.

To support the family therapeutically, the professionals advise it is important to protect children from suffering or witnessing any further violence or abuse. In other words, an order obtained as quickly as possible for the future care and custody of the child including access, supervised or not, is important to keep a child from falling into limbo. An early criminal finding of guilt or admission of such behaviour, therefore, substantially reduces the length of any family law trial and particularly the trying of the facts surrounding the alleged violent behaviour. Even when the crown withdraws a criminal charge against a violent family member because of insufficient evidence, the accusations of the victim(s) remain to be judged on the civil standard

of proof. The evidence may very well be sufficient to provide for an order to protect the child in the family law system even though it may not be sufficient in the criminal justice system.

Of great concern to the Committee, therefore, is the plight of a child involved in a child protection proceeding arising out of the same factual situation. While wishing to admit the alleged behaviour so that treatment may be undertaken for the benefit of the child, the accused will most likely receive legal advice not to admit any facts or even cooperate with a Children's Aid Society social worker or health care professional. This will delay the child protection proceeding until completion of the criminal charges. Also, counsel for the accused may recommend an expedited interim care hearing or an expedited hearing about whether the child is in "need of protection" under the CFSA. If so, the accused's counsel may be able to cross-examine the child and obtain evidence to challenge the child at a preliminary inquiry of the criminal charge, and, again, for a third time at the disposition hearing. Furthermore, when the child victim is removed from home by a Children's Aid Society, the child's evidence may become compromised by a recantation brought on by feelings of guilt and pressure from family members and their lawyers. If the criminal charge is withdrawn or if the accused is found "not guilty", the offender may

maintain innocence and not cooperate with child care workers and health care professionals to address, at least, the child's belief or statement about having been abused. In short, it is extremely difficult for members of the public to understand the two standards of proof and the inability of the administration of justice, as a whole, to compel the abusing parent to change his or her behaviour towards family members or to even admit its existence in the first place.

The Committee is of the view, therefore, that the police and crown attorneys should be better informed about the relationship and interplay between the criminal justice system and the family law system. For example, it is of no assistance to the efficient and successful resolution of a child's future care, custody and access when police and crown attorneys lay criminal mischief charges against a child who has recanted. Physical, sexual and emotional abuse by caregivers is terrifying for any child. Repeated cross-examinations in the witness box only exacerbate a child's willingness to maintain a meaningful and permanent relationship with caregivers. There is a need for police and crown attorneys to understand the procedures and approaches within the child welfare and family law systems. They should receive and understand the child care plans and professional assessments. Their professional actions within the criminal justice

system should be consistent with the "best interests" of the child victim. A speedy resolution coupled with only one examination and cross-examination for both criminal and family law proceedings arising out of the same factual situation, would be of great benefit to the child victim.

When a violent family member is found at law to be abusive and/or acknowledges not only the behaviour but, also, the feelings causing such behaviour and the impact of it upon others, a more positive relationship may be established with the abuser's child. What that relationship, if any, may be, will depend upon the evidence and the "best interests" of the child. In addition to carefully drawn custody and access orders, therefore, therapy and counselling are important. Unfortunately, there are insufficient resources within the child welfare system to offer adequate, let alone meaningful, supervised access during the time when the alleged abuser is before the criminal justice system. In some areas of the province, the Attorney General administers a supervised access program for supervised access orders limited to private custody/access cases. Children's Aid Societies also supervise access before, during and after temporary care and custody orders in child protection proceedings.

(c) **Delay - Askov**

A third example of the connection between the two systems is the way in which delay itself may be addressed. "Askov" motions may be brought under s. 11(b) of the *Charter* to dismiss or stay criminal proceedings including those under the *Young Offenders Act*, but may not be brought under the CFSA or the CLRA. The Committee is of the view that there should *not* be such a remedy available to family members who are responding to applications by Children's Aid Societies or by opposing spouses in divorce or custody/access proceedings. The Ontario Legislature and the Federal Parliament should not enact such a remedy. The remedies available within the family law system should address the "best interests" of a child and not just delay itself.

RECOMMENDATION #3

Linkage with Criminal Justice System

(a) That the cases of those young offenders who qualify for the Alternate Measures Program be dealt with by the new Family Court of the Ontario Court (General Division).

(b) That the Attorney General direct the Assistant Deputy Attorney General (Criminal) to establish a protocol with the Ministries of

Community and Social Services and Solicitor General so that all domestic violence charges involving sexual, physical or emotional abuse of children which are not prosecuted by reason of insufficient evidence, are referred to the local Children's Aid Society. All information gathered by police officers and the crown about the criminal charges should be forwarded to the attention of the responsible Children's Aid Society for investigation under the Child and Family Services Act. The protocol should also provide a clear understanding as to whether under any circumstances, criminal mischief charges will be laid against children who recant.

(c) That the Attorney General direct the Assistant Deputy Attorney General (Criminal) to give top priority to the scheduling of the prosecution by Regional Crown Attorneys of domestic violence and child abuse charges, and that such cases be heard second only to bail hearings for prisoners in custody.

7. VOLUNTARY TEMPORARY CARE AGREEMENTS, WARDSHIP,SUPERVISION ORDERS, AND THE TWENTY FOUR MONTH RULE

Part II of the CFSA authorizes a Children's Aid Society to provide voluntary services. With the consent of a child's parent(s), temporary care agreements may be entered into. The Society may place a child with foster parents for a period of time, and, if further agreements are signed, for no longer than an aggregate of twelve months. In combination with a temporary order for society wardship under Part III CFSA ("Child Protection"), the term of any temporary care agreement and wardship *must not exceed twenty-four months.* A temporary care agreement may be allowed to lapse and a further agreement may be entered into only days later. Doing so avoids the rule against an agreement longer than twelve months. For some children such a manoeuvre may be to their benefit but it may not be of benefit when they are in limbo.

(a) Twenty-Four Months of Continuous Care

Some Children's Aid Societies, parents, lawyers and judges seem to believe that the twenty-four month rule means that parents have twenty-four months to acquire the necessary parenting skills to enable their child to be returned to them. On a reading of section 70 CFSA, this a misunderstanding of the legislation. Section 70(1) CFSA clearly

states that *"the court shall not make an order under this Part that results in a child being a society ward for a continuous period exceeding twenty-four months".*

It is to be noted that the word "continuous" is used in s. 70(1) CFSA. For example, a child may be in the care of foster parents under a voluntary temporary care agreement and, after a period of time, the Children's Aid Society may launch an application to court to declare the child "in need of protection" and obtain a society wardship order. This procedure results in a child being a society ward for a continuous period of time. If, however, after a finding of "in need of protection" is made, the court orders that the child be returned home under a supervision order supervised by the Children's Aid Society, then the "continuous period" is interrupted. Upon a subsequent status review of the case six months later, the court may decide, for example, that therapy has not been of benefit to the child and that the child is at risk by being "allowed to remain in the care of a parent" (s. 37 CFSA "best interests"). The child could then again become a society ward and placed with foster parents. In other words, the twenty-four month rule can be interrupted by a supervision order or even a series of supervision orders.

(b) Series of "Supervision Orders" Beyond Twenty-Four Months

This may be a weakness in the legislation for some children in limbo even though the underlying policy of the legislation is that when children are returned home under a supervision order, they, apparently, are not in limbo because they are not "in care", i.e., they know who is making decisions on their behalf and there is a sufficient degree of permanency in their lives. In short, the CFSA provides that some children and their families may be supervised through a series of supervision orders of twelve months each for the balance of their formative years. (The CLRA and Divorce Act are similar in the sense that at least the child has one parent at home looking after the child permanently).

(c) Change of Basic Direction

The Committee has concluded that limbo in the administration of justice may very well occur for children when a Children's Aid Society changes the basic direction in their lives more than once (see page 75 for a fuller discussion). In other words, if, after a voluntary temporary care agreement, a child is returned home under a supervision order, and, then, after a status review, becomes a society ward, the child is not clear about who is making the decisions. There is no permanency in the child's life. The Committee recommends, therefore, that there

should only be one significant change in the child's basic direction of care.

(d) Control of Orders for Continuous Care Outside Twenty-Four Months

The Committee acknowledges that it cannot recommend that Children's Aid Societies not seek supervision orders after voluntary care agreements or society wardship orders. Obviously, supervision orders are helpful and are of great assistance to children and their families. What is of concern, however, is that although the court cannot make an order outside the twenty-four month time frame to prolong the continuous care of a child in care, there are a number of cases in which orders are being made years after apprehension. The best approach is to find out at the beginning of an application whether it is launched within sufficient time for a "continuous care" child, i.e., 158 days before the expiry of twenty-four months from the time of apprehension, or the date of the first temporary care agreement (see page 64). If not, the Children's Aid Society should be required by the courts to comply with shorter case management time zones imposed by the court to complete the final disposition of the application within the twenty-four months. This is not an unreasonable expectation.

RECOMMENDATION #4

Final Disposition for "Continuous Care" Children Before End of Twenty Four Months of Care

That the Rules of Practice in all applications under the Child and Family Services Act, provide that Children's Aid Societies should indicate the date of the first temporary care agreement and the date of apprehension of a child. The Rules should also provide that if any application is less than 158 days from the expiry of twenty-four months from the first date the child has been in the continuous care of the Society, the case should be placed on a special court list so that a final order will be made by the court before the end of the twenty-four month period.

8. COMMUNITY RESOURCES

(a) Lists of Resources

The extent and availability of local resources to assist families being investigated by Children's Aid Societies vary from community to community within Ontario. A resource list prepared by the Official Guardian of the professionals who assess, mediate and provide therapeutic intervention for children and families in Ontario as of March 1992, was presented to the Committee. A list of family court clinics was prepared as well. Both lists are not exhaustive and are difficult to maintain and update. Each of the resources and the professionals identified have different skills and abilities to perform the services described. Some local Children's Aid Societies, lawyers, judges and health professionals are aware of the local resources available in their communities and their effectiveness. However, some are not. The Hamilton Unified Family Court holds regular meetings about the extent and timely delivery of such services available in its area to the parties and their children.

(b) Resources Deployed Before Court Application

The Committee is of the opinion that local resources should be identified and deployed to assist families at the earliest possible

moment. This should happen even before an application to court is launched by a local Children's Aid Society or a parent. For example, the Committee learned that in York Region there is an independent intervention and assessment team which is deployed as soon as there is any indication that a child may enter into the care of the Children's Aid Society. Referrals are made by the Society, families, and by health professionals. During the six to eight week period allotted, the team is available twenty-four hours a day to deal with crises *within* the home. This proactive approach is an example of a response to a need not for 'on-site' counselling and therapy but, rather, for someone to help parents inside their own home with feeding, clothing, and caring for their children.

RECOMMENDATION #5

Resources List

That the Official Guardian, in conjunction with the Ministries of Health, Education, Community and Social Services and the Attorney General, prepare a detailed list of the services providing expertise and skills to families in crisis. The list should be distributed widely within local communities, to lawyers, judges, courts administration staff, teachers and health professionals, and should be regularly monitored and updated by the Official Guardian.

9. ALTERNATE DISPUTE RESOLUTION

The Committee discussed at length the importance of early intervention by Children's Aid Societies and whether or not they are taking too long to decide the extent of their involvement. It is clear that there is some criticism from some child care service providers and health professionals about some Children's Aid Societies not being intrusive enough by not removing children from the family home at an earlier time. Of course, as soon as an application is made to court by a Children's Aid Society, the rules and procedures in the administration of justice create an adversarial process which can have a negative impact upon the family. It can 'brand' some family members and force the delivery of written accusations in affidavit form. In other words, the process polarizes the agency and the family. The child is caught in the middle. This occurs as well in private custody/access disputes where parents are pitted against each other naturally, and by the legal system.

(a) Availability of Alternate Dispute Resolution

To overcome this problem, the Committee is of the view that alternate dispute resolution should be available to Children's Aid Societies and

families both before and after an application to court. Some use has been made of this approach.

A presentation by June Maresca, a knowledgeable lawyer in the field, and by Lorraine Martin, Clinical Co-Ordinator of Social Work at the Official Guardian's Office, revealed that the resolution of the problems between Children's Aid Societies and parents has been assisted by an impartial person skilled in the techniques of mediation. It has rarely been used to date. The potential for such an approach is enormous.

The parties, including the Society's social worker in charge of the case, should be encouraged to mediate voluntarily. The parties should mediate personally and not through their counsel. They should participate fully in the process; they should achieve a resolution they can live with; and their decision must be in the best interests of their children. Caution, however, should be exercised by the mediator before proceeding where a power imbalance between the parties might create an unfair bargaining process.

Alternate dispute resolution may be inappropriate for people addicted to drugs or alcohol or when there has been violence in the home and the children continue to be at risk. Children who are old enough to

understand and contribute to the process, should be meaningfully involved. Importantly, parents should not be blamed or stigmatized in the process. Also, the parties should agree that they will not go to court about the issues as long as the process is productive in the opinion of the facilitator. This removes the leverage gained through use of threats to proceed with a court application.

Within the family law system itself, the timeliness achieved through alternate dispute resolution meshes well with case management and reduces acrimony substantially. It is not an "alternative" but, rather should be an integral part of the progress of the case itself. This process has already been used very successfully in custody/access cases at the Family Mediation Pilot Project of the Unified Family Court in Hamilton.

It is trite to say that the adversarial process in the court system exacts a tremendous cost both emotionally and financially. It was suggested that before an application to court is made, Children's Aid Societies should enter into an alternate dispute resolution process so as to avoid further acrimony. Family members should be able to articulate their concerns at an early stage to a facilitator. The facilitator would then translate the social worker's language to the family. The discussions

should occur as a rule without counsel for the parties being present. Above all, whatever is said should not be introduced as evidence at trial without the consent of the parties. In some cases, however, there may be merit in involving counsel for the parties and children at this stage.

Some success has been noted in cases where this process may also be instituted after the apprehension of the child. Even though the matter must be brought before the court within five days of apprehension (s. 46 CFSA), the court has the power to acknowledge that the alternate dispute resolution process is in place which allows the parties an additional twenty-five days to reach a mediated solution before holding a hearing about the temporary care and custody of the child (s. 51 CFSA). This is good timing, before the parties become polarized by the process.

For various reasons, the Committee observed that there are many cases being adjourned for a succession of times so that the "30 day adjournment rule" principle established to combat undue delay (see page 86) is being subverted.

Dr. Steinhauer is of the opinion that a period of twenty-five days should be sufficient to allow a Children's Aid Society to negotiate with a family and to formulate, with or without agreement, a long range plan for the child. Some cases may take longer but the issues should be narrowed considerably. The Society should have a clear idea as to where, for how long, and with whom the child should live. If alternate dispute resolution is making progress at the twenty-fifth day or the subsequent adjourned date, the court may make an order of temporary care and custody maintaining the status quo. With the consent of the parties and the person who will be caring for the child during the adjournment, the case, therefore, should be adjourned a further thirty days to complete the negotiations. In the Committee's view, no further adjournments, however, should be granted.

In summary, the Committee is of the opinion that the potential litigants in child proceedings should be aware of the resources available to them in their communities and the potential for alternative dispute resolution conducted outside the court system. Education, awareness, and availability of resources are vital to the successful implementation of alternate dispute resolution in all areas of the province.

(b) Settlement Negotiations

In addition to alternate dispute resolution, settlement negotiations are conducted within the court process. The Official Guardian and the Ontario Legal Aid Plan have extensive programs which encourage the parties to narrow the issues and to settle. Each of the parties and their children has a vested interest in the outcome of the resolution process, i.e. the Official Guardian on behalf of the child, and the Ontario Legal Aid Plan as to whether a legally aided party should receive further public funding.

Some people argue that alternate dispute resolution outside court has a better chance of success than a negotiated settlement with lawyers in court. Others argue that negotiations involving lawyers at either stage are as effective. There is no data to show whether one approach should be preferred over the other. Reducing the likelihood of subsequent applications for status review after a crown wardship order in child protection proceedings and variation of custody/access orders in private custody actions, is an important goal. Of more importance is the fact that alternate dispute resolution without counsel and settlement negotiations with counsel should be encouraged so that children do not drift too long into limbo.

(c) **Mediation**

Section 31 CLRA authorizes the court to appoint a mediator in custody/access cases. The order can only be made with the consent of the parties and the mediator. The parties select the mediator who confers with the parties and attempts to obtain an agreement. The mediator agrees to file a full report within the agreed "time specified" in the order. The parties decide at the time of the order whether the mediation is "open" (a full report is prepared whether an agreement is reached or not), or "closed" (no information is given in the report). The report is filed with the court clerk or registrar who is required to give a copy to the parties and counsel representing the child (in practice, copies are provided by the mediator). Except with the consent of the parties, if the mediation is "closed", any facts disclosed to the mediator are subsequently not admissible as evidence in court. All fees are paid by the parties. The Committee is not aware of the extent to which parties take advantage of "open" or "closed" mediation.

(d) **Approval of a Judge**

The Committee is of the view that any settlement involving the future care and custody of a child reached in a child proceeding through alternate dispute resolution, negotiated settlement, mediation or otherwise, should be approved by a judge. *Rule 7.08* of the *Rules of*

Civil Procedure governing the Ontario Court (General Division) provides:

> "No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of a claim, is binding on the person without the approval of a judge".

Although children are not "parties" to child protection and custody/access proceedings, the proceedings concern their future care, custody and access. The Official Guardian is the legal representative of the child as if the child were a party: Reid v. Reid (1975) 11 O.R. 622. The "best interests" of the child as defined by both Acts, is at stake. The Divorce Act requires a review to the satisfaction of a Judge of the support arrangement and other settled issues before a divorce is granted. The settlement, therefore, should be reviewed by a judge to ensure that it is beneficial to the child; or, at least, it should be reviewed on behalf of a child who has been apprehended by a Children's Aid Society.

RECOMMENDATION #6

Dispute Resolution and Settlement

(a) That the Attorney General make resources available to the new Social Justice Services Division of the Ministry of the Attorney General to establish a protocol among the Children's Aid Societies, local

resources, and the administration of justice to promote and encourage the establishment and monitoring of voluntary dispute resolution at the commencement of an application, statement of claim or petition for divorce in proceedings which involve the future care, custody and access of children.

(b) That the Attorney General request the Minister of Community and Social Services to enact a section in the Child and Family Services Act to provide a structure for dispute resolution in a wording similar to s. 31 of the Children's Law Reform Act and that both Ministries share the funding of such services on a formula to be agreed upon by them.

(c) That the Rules of Practice should include a rule that all settlements in proceedings involving the care, custody and access of children, be considered by a judge for approval or at least when a child has been apprehended by a Children's Aid Society in a child protection proceeding.

10. ASSESSMENTS

In order to determine the needs of a child and the parents' abilities and willingness to care for their child, judges need assessments prepared by health and social work professionals. Judges advise that they often require substantial expert evidence to support an order for crown wardship or any order which permanently denies the child's access to the primary caregiver or parent(s). The availability, timeliness and quality of assessment reports filed in court vary considerably in Ontario. Presently, there is no universally accepted uniform standard for them. With the exception of psychologists and psychiatrists who are regulated by their colleges, there are no enforceable regulations or standards of practice for assessors.

The Committee learned that it is important for an assessor to not assume the duties of a facilitator or mediator. It undermines the necessary neutrality of the assessor. To put it another way, the purpose of the assessment is to investigate, evaluate, draw conclusions and to make expert recommendations to the court. The assessor cannot be expected to do so and facilitate a settlement as well. However, in many cases, assessors do make suggestions as to how to resolve the issues which form the basis of settlement negotiations

conducted by counsel for the parties, by the Official Guardian for the child, and by the settlement procedure set up by the Ontario Legal Aid Plan.

(a) Assessments Generally

Generally speaking, therefore, assessors of all professional backgrounds interview, investigate, research, counsel, advocate, educate, negotiate and, at times, arbitrate verbal disputes. They also prepare reports which address the particular needs and concerns of the children, the parties, their lawyers and the judges. It is a difficult and complex role. It requires professional integrity on the assessor's part.

Unfortunately, the ability and skills of assessors vary widely throughout the province. The quality and timeliness of their assessments and reports are inconsistent. The Committee is of the view that assessments should concentrate upon the needs of the child and the abilities of the primary caregivers or parents to meet those needs. It would be helpful, therefore, to establish provincial standards through regulations under the relevant legislation. However, the Committee realizes that this is a difficult subject and suggests, therefore, that there be a specific and thorough review of assessments

by the Attorney General in conjunction with the Ministries of Health and Community and Social Services.

Also, some judges are of the view that assessors should not decide or even make recommendations about the issues facing the family. A few judges are vigorous in their approach of requiring substantial corroborative evidence to support the assessor's professional opinion. Other judges appreciate the contextual background of Assessment Reports which put into perspective some very difficult social issues such as alternative lifestyles, addictions, AIDS, religious practices and cults. The Committee is of the view that the expert evidence and opinions of an assessor as expressed in an Assessment Report are valuable for the timely resolution of cases. It is hoped that the evidentiary weight given to the reports will not be diminished by a stricter approach in the exercise of judicial discretion. After all, in the process of expeditiously deciding the future care and custody of children, any approach which compels the parties and their counsel to cross-examine and lead evidence of a destructive nature in order to verify or dislodge the factual foundation of an assessor's professional opinion, may stigmatize the family and their children further. It is not conducive to dispute resolution and settlement. On the other hand, the Committee wishes to point out that cross-examination at any stage

of a proceeding is an effective method to narrow and understand the issues better. If conducted in a helpful and effective way, it may open up a better awareness of the issues and lead to resolution even at the trial stage.

(b) Court Ordered Assessments

Section 54 CFSA provides that after a finding of "in need of protection", a court may order "within a specified time" assessment of a family by a qualified person to perform medical, emotional, developmental, psychological, educational or social assessments. The conclusions and opinions in the report must be prepared and delivered within thirty days after the "specified time" to the court and to the parties seven days prior to trial. Similarly, by s. 30 CLRA, on the consent of the parties, the court may order a custody/access assessment. The Official Guardian by order under s. 112 of the Courts of Justice Act, may be requested by court order to prepare and file an Official Guardian's Report, a social worker assessment.

(c) "Issue Focused" Assessments

The Committee is of the view that, generally speaking, at or near the beginning of a case, some judges and lawyers may not be focusing upon the specific health and behavioral symptoms revealed by the

facts of a case. Rather, they request an assessment of a general nature. This may be due to the failure to require a case conference near the beginning of the application when all the information available may be reviewed and the issues and facts narrowed. It may be of greater assistance, therefore, to the parties and the judge who might ultimately decide the case, to obtain an issue focused assessment from assessors who will accept them. Some assessors feel constrained by an issue focused approach and are of the opinion that the assessment can only be helpful if the assessor is given a wide professional latitude.

In the Committee's view, judges and lawyers should be made more aware of the training and expertise of each of the health and social worker professions so that Assessment Reports are prepared to address a particular problem presented at the beginning of the court proceedings. By focusing on particular symptoms exhibited by the parties and children, a better result may be achieved in a more timely and less expensive way. The Committee suggests that judges in their endorsements and lawyers in their letters of instructions to a professional assessor, attempt to define the issues facing the court so that Assessment Reports are issue focused and, therefore, more relevant and helpful.

(d) Cost of Assessments

Depending upon the focus of the assessment and the availability and qualifications of the assessor, Assessment Reports may be very expensive. In child protection cases the fees are paid by the Children's Aid Society. In custody/access proceedings, the Official Guardian does not charge a fee and, in 1993/94, his office assigned 797 cases. Otherwise, the parties must pay a private assessor except where it would cause a financial hardship to the parties (s. 30(14) CLRA). It is not clear from the Act as to who pays when a court makes such an order for assessment. Apparently, the intention was that the court must require the parties, in some proportion, to pay all fees and expenses of the assessor (see s. 30(12) and (13)). In any event, either or both parents may be aided by the Ontario Legal Aid Plan which pays for the report. Except for the Official Guardian, the Committee did not receive any statistics as to the extent of the use and cost of assessments. The availability of assessors at affordable rates is unknown. It may be that both s. 30 and s. 31 (mediator) CLRA should be reviewed so that it is clear as to who should pay for the fees and expenses of assessors and mediators.

(e) **Timeliness of Assessment Reports**

Depending upon the backlog and availability of qualified assessors, the "specified time" or estimated time to produce an Assessment Report varies considerably and may be as high as six months. Clearly, the timeliness of the reports is important to children drifting into limbo.

(f) **Administration of Delivery of Assessment Reports**

It was suggested to the Committee that the Ministry of the Attorney General undertake the coordination and administration of the delivery of Assessments Reports. This task should not be undertaken by the Official Guardian who represents children in many cases. The Ministry through its new Social Justice Service Division[6], should consider identifying the qualifications and availability of assessors in the local communities of Ontario. Also, the court administrators or local trial coordinators should be trained to assist in the process and advise about matching the assessment needs identified in the court order to the local resources available. The administrators would not choose the assessor but, rather, would assist the parties, their lawyers and the court in identifying assessors, if any, available in the community. Such a system should coordinate the timeliness of delivery by ensuring that children who are in limbo longer than

others, receive priority as much as possible. The Committee favours this suggestion. It will be difficult to organize and implement.

RECOMMENDATION #7

Assessment Reports

That the Social Justice Services Division of the Ministry of the Attorney General review with Ontario Association of Children's Aid Societies, the Ministry of Community and Social Services, the Ministry of Health and the Ontario Legal Aid Plan, the frequency and value of Assessment Reports, the regulations, standards, qualifications and training of assessors, the fee structure that should be paid to them out of public funds, and the manner in which the fees should be shared by the public institutions involved.

(g) Assessments at Interim Care and Custody Stage

In child protection hearings, an assessment may only be ordered *after* the child has been found to be "in need of protection" (s. 54 CFSA). When requested, therefore, to make a temporary care and custody order shortly after an apprehension, the judge will not have an assessment available. Without an assessment it is difficult for a judge to make a meaningful order under s. 51(3) CFSA within thirty days of the apprehension. The legislation requires the judge to determine

whether there are reasonable and probable grounds to believe that there is a substantial risk to the child's health or safety and whether or not the child should be returned home with or without the supervision of the Children's Aid Society. This test is different than the "best interests" test applied at trial. Some say it is more stringent. It would be helpful to the court, therefore, to have an assessment which addresses the statutory criteria of the temporary order.

In some cases, the parties will consent to a s. 54 CFSA assessment "as if" the child is "in need of protection". In other words, the protection issue is litigated at a later stage. When produced, parents may not agree with it and request another assessment. Usually the Society will not undertake another assessment at its own expense. Societies do not have to agree to any assessment prior to a finding of "in need of protection" and any assessment at this stage of a proceeding clearly breaches the wording of the legislation.

The Committee is of the view that the court should be vested with the authority to order an "interim" assessment addressing the criteria in s. 51(3) CFSA, and, also, to receive from the Society a plan for the child's short term future care. Later in the proceedings, if the child is found to be in need of protection, a full s. 54 CFSA assessment may

be required. It and the plan for the child's care could be updated before the making of a final disposition order. This approach may not be acceptable to the Children's Aid Societies in that there may be no budgeted funds to do so. Without clear legislative authority any Society may challenge the court's authority to require an assessment at this early stage of the proceedings.

The Committee is of the view that if children are not to drift into limbo, Children's Aid Societies should make available to the judge at the earliest possible moment, a comprehensive assessment of all of the information in their possession. This should include investigation and negotiation notes leading up to the apprehension together with all information from collateral sources such as doctors and other professionals who have been involved with the family. When combined with the information compiled by the society investigative social worker in charge of the case, these materials should form the basis of an "interim" s. 51 (3) CFSA assessment by a qualified professional to assess whether there may be a substantial risk to the child's health or safety and whether the child should be returned home with or without supervision. The assessor should also interview the parents and any other important persons in the child's life before

delivering the "interim" assessment to the parties and the court. It must be done quickly.

The Committee is not suggesting that "interim" assessments should happen in all cases. Rather, when a Society needs more than thirty days from apprehension to formulate a plan about whether the child should or should not be returned home with or without supervision, the Society should be required to obtain an "interim assessment". As stated by Dr. Steinhauer, a decision must be made as quickly as possible by the Children's Aid Society. The court should be made aware of facts which, when viewed on the balance of probabilities, will <u>not</u> place the child at substantial risk. If the child is ordered to be returned home under a supervision order, the judge needs to know the "conditions relating to the child's supervision as the court considers appropriate" before making the order (s. 51 CFSA). Whether this suggestion makes it more difficult for Children's Aid Societies to keep children in care after apprehension, is dependant upon Societies being able to quickly marshall their resources to satisfy a judge about the interim "substantial risk" test of s. 51 (3) CFSA. Many Societies have professional advisers available to them for consultation on short notice.

The Committee prefers that the assessor of substantial risk be independent of the Children's Aid Society. However, the Committee recognizes that not all Societies in the province have sufficient resources available to them to do so. In essence, therefore, the thrust of the Committee's preference is that the court should be able to rely upon the professional integrity and independence of the assessor even though a particular assessor may be regularly hired by a Society to provide assessments and advice.

The Committee believes that if Ontario's Children's Aid Societies are fully committed to preventing children from drifting into limbo, then, in conjunction with the Ontario Association of Children's Aid Societies, they should be able to persuade the Ministry of Community and Social Services to allocate a "budget line item" for s. 51(3) CFSA interim and s. 54 CFSA full assessments. The Committee also believes that if this is done, the existing funding of s. 54 CFSA full assessments may be reduced and savings may be achieved by the reduction of the number and length of trials.

The Committee recommends, therefore, that the Attorney General consult with the Minister of Community and Social Services to amend s. 51 CFSA to authorize the court to require an interim assessment by

a professional assessor in cases where, at the time of apprehension, the Society requires more time to formulate a decision about the interim future temporary care and custody of a child. The Committee has attempted to avoid any direct impact upon the resources of the Ministry of Community and Social Services, but in this instance, the Committee strongly believes that the availability of an "interim assessment" is absolutely essential.

RECOMMENDATION #8

Amend s. 51 CFSA to Provide for Interim Assessment of "Substantial Risk"

That the Attorney General request the Minister of Community and Social Services to amend s. 51 of the Child and Family Services Act so that when a Children's Aid Society requires more than thirty days from apprehension to decide whether a child should or should not be returned home with or without supervision, a court may order the Society to serve and file an interim assessment report by a professional assessor within thirty days of the said order.

11. INTERIM TEMPORARY CARE AND CUSTODY ORDERS

The Committee noted that at this crucial interim stage, the future care, custody and access of children in both custody/access and child protection proceedings may effectively become, because of delay, the ultimate decision in many cases. Some orders may be made after very limited information is filed in the form of affidavits prepared and served by the parties without any cross-examination of any of the parties.

(a) Oral Evidence

Some Committee members suggested that the oral evidence of the parties should be heard at this stage so that the parties have a direct, personal involvement in providing the judge with the opportunity of assessing their history, motivation and credibility. It would also give the court the opportunity, through cross-examination, to understand the extent of any exaggerations. It is important to know what evidence the parties have not sworn to which may have a direct bearing upon the issues. Such an approach could cause unnecessary delays at the beginning of the court process and may turn the proceeding into a "full blown" trial.

(b) No Cross-Examination

Some members suggested that there should be no cross-examination on the affidavits. They suggested an early case conference without any oral testimony at the first appearance before a judge. All parties would be present with their counsel to determine, in the presence of a judge, whether the child is at risk and what, if any, interim arrangements should be made. Discussions would take place with the judge about obtaining an assessment, preparing plans for the child's care, and determining the existence of any other relevant evidence. This proposal would require the judiciary to become or assume the role of an inquisitor.

(c) Case Conference

On balance, the Committee is of the view that any steps taken to "concretize" the parties by allowing confrontational warfare, should be avoided at all costs. If the resources in the community and alternate dispute resolution attempts have failed to resolve the issues faced by the family, a case conference should be held (preferably in a court room setting, if available, and, if not, in a conference room) on the first return of the application to court or shortly thereafter. It should be conducted in a relaxed way by the judge. The parties themselves should be encouraged to speak directly to the judge. In short, the

documentation and available information should promote discussion with the judge chairing the meeting. If the parties are unable to come to some interim understanding, then another judge, not the judge presiding over the case conference, should decide in a courtroom, the interim care and custody of the child on the basis of the documentation filed. Only in very exceptional cases should evidence be called or cross-examination permitted. It is hoped at this stage that an interim assessment and child care plans are available in both child protection and in custody/access proceedings. These documents would be of great assistance to the case conference judge in promoting a full discussion. They would also be of great assistance to the judge making the interim decision.

RECOMMENDATION #9

Case Conference at First Court Appearance About Care and Custody of Child

That the Rules of Practice include a rule requiring a case conference of the parties at the first court appearance or shortly thereafter to determine the interim temporary care and custody of a child and that, except by leave of the court, no cross-examination be allowed on the affidavits and supporting documentation filed at that time.

12. FINDING "IN NEED OF PROTECTION"

A finding as to whether a child is in "need of protection" as defined by s. 37 CFSA, is of critical importance to the child. The longer it takes, the longer the child will drift into limbo.

(a) Fixing Date for Hearing

By s. 52 CFSA, if the determination of "in need of protection" is not made within three months after the commencement of the proceeding, the court, by order, shall fix a date for the hearing. The date may be the earliest date that is compatible with the "just determination" of the application. The court, by s. 52(b) CFSA, may also give such directions and make such orders with respect to the proceedings as are "just".

(b) Fix Hearing Date at First Case Conference

The Committee is of the view that the obligatory time zones should be enforced by the court. Other than as specifically authorized by the legislation, under no circumstances should the fixing of a hearing date be delayed. Optimally, it should be fixed at the time of the first case conference meeting.

(c) **Splitting the Hearing**

Section 50(2) CFSA provides:

> *"In a hearing under s. 47(1) ('in need of protection'), evidence relating only to the disposition of the matter shall not be admitted before the court has determined that the child is in need of protection".*

There must be a finding of "in need of protection" before any evidence is lead about disposition. Once, therefore, a finding of "in need of protection" is made, the hearing should be adjourned for further evidence about the proper disposition of the case. Although this splits the case in many applications, the Committee is of the view that a "just determination" requires an early finding of "in need of protection" so that the court, before making a disposition order, has jurisdiction to order a full assessment (s. 54 CFSA).

(d) **Hearing Within Five to Six Months**

In summary, the steps and legislated obligatory time zones are:

		From Apprehension
1.	Apprehension	5 days
2.	Case Conference, Interim Assessment Report, Interim Care and Custody Order, Appointment of Child's Counsel and Fix Hearing Date for "In Need of Protection"	30 days or longer as allowed by the judge

3.	**Hearing "In Need of Protection"**	**90 days or longer as allowed by the judge**
4.	**File Assessment Report (assuming "specified time" is 30 days) and Plans for Child's Care**	**150 days**
5.	**Hearing Date: Disposition (assuming the hearing date is fixed 37 days after the due date for the filing of the Assessment Report)**	**158 days**

Five to six months is long enough in any child's life to make a meaningful decision. In fact, for a child in continuous care, the timing of the legislation only allows for two further status reviews of six months each. The Society should be encouraged to accomplish the purpose of its intervention over the twenty-four months of continuous "temporary" care permitted under s. 70 CFSA. If the hearings of "in need of protection" and disposition are lengthy (more than two days each) and, therefore, spread out over a period of time, it may only allow for one status review. The Committee is firmly of the view that the court should expect the parties and their counsel to be fully prepared within the above time frames.

(e) Timing of Assessment Reports and Hearing Date

If the Committee's recommendation about the administration of assessments is fully implemented (see Recommendation #7 at page 54 above), assessors should be expected to prepare, write and file an Assessment Report within sixty days of an order even though s. 54 CFSA presently suggests that it be accomplished within thirty days. The hearing date for determining whether the child is "in need of protection" should be heard as early as possible so that the preparation of the Assessment Report begins as soon as possible. It should be noted that the Committee is not recommending that there be an assessment or even an interim assessment in every case. What is needed is a critical analysis by the court as to whether or not an assessment will contribute to the decision making process.

(f) Early Finding of "In Need of Protection" - Stigmatization

An early finding of "in need of protection" might alienate parents and put undue pressure upon Children's Aid Societies. The Committee is of the opinion that if the Recommendations in this Report are implemented so that, at least, alternate dispute resolution and interim assessments at the time of an interim custody and care order are available to both the family and the Children's Aid Society, stigmatization will be reduced. Also, if the parties are made fully

aware of the expectations of the court to comply with the legislated times zones, it may be that the Societies will re-orient their procedures so that alternate dispute resolution is fully explored, as much as possible, before apprehension of the child. If this proposal proves to be difficult for Societies, the Committee encourages the courts to implement early case conferences conducted with as little acrimony as possible and with the fullest and most direct involvement of the parties. The Committee thinks this process should reduce the "labelling" of parents and increase the opportunities for resolving the permanency planning of the child's future care and custody. It should be the duty of both the judiciary and the lawyers to encourage the parties about the reality of the situation for the child and to bring to bear the importance of honouring the legislated time zone thresholds.

(g) In "Need of Protection" v. "Substantial Risk"

The Committee also considered whether there should be one standard legal test in the Child and Family Services Act rather than two, i.e. "in need of protection" (S. 57 CFSA), and "substantial risk" (s. 51(3) CFSA). Ideally, if the timing for both decisions could be merged in practice and delivery, the problem could be minimized in that only a finding of "in need of protection" need be made. However, the reality of most factual situations is that while the Children's Aid Society is gathering

information and the parents are attempting to retain counsel, the child must be placed in a secure environment and temporarily protected from the abuse or neglect which prompted the apprehension.

Some judges advise that the "substantial risk" standard is more stringent than the "in need of protection" standard. The Committee is of the view that the "substantial risk" standard is a proper indicator of the test which should be applied at the beginning of the application. The more expansive and detailed test in s. 37 CFSA as to "in need of protection", is capable of being thoroughly explored and tested by the parties at a hearing or trial which should be held between thirty to sixty days after apprehension. In any event, as submitted by the Committee in its approach to the Recommendations in this Report (see page 13), the Committee is not reviewing the policy underneath the legislation. It is hoped that by decreasing the time between the judging of the two standards, the drifting of children into limbo may be curtailed even further.

RECOMMENDATION #10

Date of "Child Protection" Hearing Fixed at First Case Conference

That the Rules of Practice include a rule requiring that the date for the hearing as to whether a child is "in need of protection", be fixed at the first case conference and proceed no later than thirty to sixty days after apprehension.

13. SOCIETY WARDSHIP

A further argument was presented to the Committee that, after a contested finding of "in need of protection", an order for society wardship may place some children further into limbo. For example, by section 57 (1) CFSA, a child may be made a ward of the Society for a period up to and not exceeding twelve months at a time. It is argued that this may be confusing to children and parents and may delay permanency planning for a child.

(a) Each Case Requires a Special Remedy

In the opinion of the Committee, each case requires a special remedy. Each child has special needs that may be beyond the parents' ability to meet and which require the help of the child welfare system. It was successfully argued to the Committee that the administration of justice should focus upon "this parent's ability to care for this particular child, now, or within the immediately foreseeable future". The issue is not whether "this parent, even with extraordinary help from a Children's Aid Society, may be able within twelve months let alone twenty-four months to improve parenting skills to provide minimal care".

(b) Meaningful Access/Supervised Access

As stated earlier, Doctors Steinhauer and Wilkes advised that when a child is in the interim care of another person, the child must feel a real connection through meaningful access visits with the primary caregiver or parent. It is "co-parenting". Some children, of course, should not have access to abusive or neglectful parents.

The doctors advised that the younger the child, the more important it is to maintain the child's psychological bond with his or her natural parents. Otherwise, for a young child the bond should be quickly severed and developed with foster parents. Older children who have relatively good memories of their parents, should have access to them even if they are headed in the direction of being adopted.

With this advice, the Committee commends the Attorney General for establishing at fourteen locations in Ontario a supervised access program for children and their parents who would not otherwise have the opportunity to do so because of the alleged behaviour of the parents. This program is only provided in private custody and access cases.

In child protection matters, a court may order that access be in the discretion of and under the supervision of a Children's Aid Society. The Committee urges the supervised access program and all Children's Aid Societies to provide meaningful access so that until a final decision is made by a court, children feel a real connection with primary caregivers or parents.

(c) In Which Direction Should the Child Proceed?

After a court reviews the evidence, the Assessment Report, the plan for the child's care, and hears the submissions of counsel for the parties and the child, the child may require some sort of transitional structure before a final disposition. If indicated, it should be made very clear by the court that the child should become a society ward in a foster home with a view to being returned home. In other cases, if indicated, the court should make it clear that the child should live in a foster home before being made a crown ward with or without access.

The Committee strongly recommends, therefore, that, even prior to a hearing about the interim care and custody of a child, the Society should be expected to decide in which direction the plan for the child should proceed. The court, on the balance of probabilities, will test the Society's decision after hearing all the evidence including any

assessment. The child, if old enough, will be aware of and participate in the plan for the child's care before the hearing. If the basic direction is either towards crown wardship or being returned home, the parents and foster parents should be capable of co-parenting until the court determines "in need of protection" and makes a disposition order at trial and on a status review. At least by the time of the first status review application, the Society and the court should have enough information to decide upon a permanent plan for the child. Ideally, therefore, there should be no need for further or multiple status reviews in the future.

(d) Status Review

No status review is permissible when a child is a crown ward without access and resides, after placement by the Society or by a Director, in another person's home for the purpose of adoption (s. 64(9) CFSA). Also, where the child is not in an adoption placement, no party except the Society may apply to court for a status review within six months of the disposition order, unless the court is satisfied that a major element of the child's care (previously relied upon by the court) is not being carried out (s. 64 (15) CFSA). It is not the function of a status review hearing to retry the facts in support of the original finding of

"in need of protection". The original finding and all evidence introduced previously at the original hearing is res judicata. It should not be relitigated. The only standard against which to review the future care, custody and access of a child is the "best interests" test established on the evidence available from the time of the original finding to the time of the status review.

(e) **Foster Parents**

Limbo could arise also when a court makes a decision which contradicts the basic direction in which the child is headed. Sections 39 (3) and 64 (6)(d) CFSA allow foster parents who have continuously cared for a child for six months prior to the hearing or status review to become parties to the proceeding. They usually oppose a change in direction. Similarly, by s. 61 (7) CFSA, where a crown ward has lived continuously for two years with foster parents, the Society may only remove the child by giving the foster parents ten days notice of the proposed removal. Foster parents are also entitled to request a review by the Society and request a Director to review the Society's decision if they are not satisfied with it.

Some of the most difficult cases at trial, therefore, involve foster parents who wish to adopt a child. Stiff opposition is mounted by

natural parents who lead evidence about how they have improved their parenting skills to meet their perceptions of the needs of their child. Once a finding of "in need of protection" is made, the Committee urges the court to decide the direction of the child's permanent care plan as expeditiously as possible in the "best interests" of the child (s. 37 CFSA). In other words, before the end of twenty-four months from apprehension, either the child who has been in the continuous care of the Society will return home with or without supervision or the child will become a crown ward without access to his or her parents, ready for adoption. Some children become a crown ward with access to his or her parents. Except in truly exceptional circumstances, the basic direction should not be changed on a status review. If strong jurisprudence is built up in the future by the judges supporting this principle, there should be fewer cases involving foster parents.

(f) Change Direction Only Once

The Committee is of the view, therefore,that, on any status review of a child, if the "best interests" test indicates that the direction should be changed, (for example, from a supervision order to one where the child would become a crown ward without access), it should occur only once within the twenty-four month time zone. Although the

Committee recognizes that this presents a difficult problem for Children's Aid Societies, parents, and judges who must decide these cases, the remedial option of changing the basic direction more than once from either society/crown wardship to a supervision order or vice-versa, means that children will be placed further into limbo while the system "shifts gears" and starts over again with a new focus. In essence, it is a complex fitting of the facts of the case into the obligatory time zones and viewing them through the criteria defining the "best interests" of the child. This is what a court must achieve. When a judge, therefore, allows the changing of the basic direction more than once, the child, through uncertainty and a lack of focus and permanency, will drift further into limbo and become mired in the court system beyond twenty-four months. The Committee realizes that this is an area of judicial independent discretion and, therefore, refrains from making a specific recommendation.

14. "BEST INTERESTS" TESTS

The importance of not changing direction more than once is clearly spelled out in the "best interests" test of s. 37 CFSA. The thirteen statutory criteria speak for themselves especially those which are underlined:

> *37 (3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that he or she considers relevant:*
>
> 1. *The child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.*
> 2. *The child's physical, mental and emotional level of development.*
> 3. *The child's cultural background.*
> 4. *The religious faith, if any, in which the child is being raised.*
> 5. *The importance of the child's development of a positive relationship with a parent and a secure place as a member of a family.*
> 6. *The child's relationships by blood or through an adoption order.*
> 7. *The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.*
> 8. *The merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent.*

9. *The child's views and wishes, if they can be reasonably ascertained.*

10. *The effects on the child of delay in the disposition of the case.*

11. *The risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent.*

12. *The degree of risk, if any, that justified the finding that the child is in need of protection.*

13. *Any other relevant circumstance.*

The Committee is persuaded by expressions such as "the child's physical, mental and emotional needs", "the appropriate care or treatment to meet those needs", "a positive relationship with a parent", "a secure place as a member of a family", "the importance of continuity in the child's care", and "the effects on the child of delay". Clearly the Act requires a thorough analysis of the criteria in an expeditious way to ensure that children do not drift further into limbo.

Similarly, the importance of making an expeditious order in a custody/access proceeding is found in s. 24 CLRA and especially the subsections which are underlined:

> *24.-(1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child.*

(2) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a court shall consider all the needs and circumstances of the child including,

(a) the love, affection and emotional ties between the child and,

(i) each person entitled to or claiming custody of or access to the child,

(ii) other members of the child's family who reside with the child; and

(iii) persons involved in the care and upbringing of the child;

(b) the views and preferences of the child, where such views and preferences can reasonably be ascertained;

(c) the length of time the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;

(e) any plans proposed for the care and upbringing of the child;

(f) the permanence and stability of the family unit with which it is proposed that the child will live; and

(g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

(3) The past conduct of a person is not relevant to a determination of an application under this Part in respect of custody of or access to a child unless the conduct is relevant to the ability of the person to act as a parent of a child. 1982, c. 20, s.1, part.

15. PLAN FOR CHILD'S CARE

Both statutes require the court to receive a plan for the child's care (s. 56 CFSA and s. 24 (2)(e) CLRA). In child protection cases the CFSA states:

> *S. 56. The court shall, before making an order under section 57 (disposition order) or 65 (variation of disposition order on status review), obtain and consider a plan for the child's care prepared in writing by the society and including,*
>
> *(a) a description of the services to be provided to remedy the condition or situation on the basis of which the child was found to be in need of protection;*
>
> *(b) statement of the criteria by which the society will determine when its wardship or supervision is no longer required;*
>
> *(c) an estimate of the time required to achieve the purpose of the society's intervention;*
>
> *(d) Where the society proposes to remove or has removed the child from a person's care,*
>
> *(i) an explanation of why the child cannot be adequately protected while in the person's care, and a description of any past efforts to do so, and*
>
> *(ii) a statement of what efforts, if any, are planned to maintain the child's contact with the person; and*

(e) where the society proposes to remove or has removed the child from a person's care permanently, a description of the arrangements made or being made for the child's long-term stable placement. 1984, c. 55, s. 52. [Emphasis added)

The wording of s. 56 CFSA is very clear. It requires a written statement of criteria by which the Society will determine when its wardship *or* supervision is no longer required. The Committee, therefore, is fortified in its view about changing directions only once.

The Committee was truly concerned, however, to learn that it is apparently difficult for some Societies to produce a properly drawn plan for the child's care at the disposition hearing let alone earlier in the process. The Committee urges judges to insist upon the early filing of a plan for the child's care in accordance with the complete wording of s. 56 CFSA (and at an earlier stage in the process, if possible), with, at least, a clear statement from the Society as to the purpose of the intervention, the realistic length of time expected to achieve the purpose, AND the direction of the Society's intervention i.e., early reunification of the child and family or permanent removal from the family. It is hoped that this could be accomplished at the times of apprehension and issuance of any order for the temporary care and custody of a child.

(a) Purpose of Intervention

The carrying out of the purpose of the Society's intervention is accomplished by the requirements of the Act: (a) the appearance in court of the parties within five days after apprehension, (b) the temporary care and custody order within thirty days of apprehension if one of the parties or the person caring for the child does not consent to an adjournment, (c) the actual hearing of a finding of "in need of protection" no later than a fixed date set within three months of apprehension, and (d) the disposition hearing which the Committee strongly suggests should be no later than 158 days after apprehension. The court should expect a simple statement of purpose from the Society at the beginning about the direction in which it recommends the child should proceed. This statement of purpose need not contain any evidence. It may be modified or the direction changed later in a draft plan for the child's care at each step of the above process. Eventually a full plan for the child's care must be filed at the hearing of the disposition order and at any status review.

(b) Time to Achieve Purpose of Intervention

At the disposition hearing, the Society should advise the court of the "estimate of the time required to achieve the purpose of the Society's intervention". For example, the court should clearly know when the

Society intends to terminate a supervision order and seek a society wardship order with a view to crown wardship without access. By doing so, the child if old enough, will know who will be making decisions in the immediately foreseeable future.

RECOMMENDATION #11

Plans for Child's Care and Purpose of Children's Aid Society's Intervention

That the Rules of Practice include a rule authorizing case management judges to require at the earliest possible moment the filing of written child care plans by the parties and, as well, in child protection cases, a written statement about the purpose of a Children's Aid Society's intervention.

16. EXPECTATION OF THE ADMINISTRATION OF JUSTICE TO REQUIRE ALL PARTIES TO COMPLY WITH THE LEGISLATED TIME ZONES

(a) Courts Are Last Resort

Recourse to the administration of justice should be a last resort. When potential litigants cannot resolve their differences outside of the court process, they should know that judges, lawyers and administrators will expect compliance within the times prescribed by the word "shall" in both the CFSA and the CLRA. The parties themselves should also demand compliance and expect timely judicial decisions. The Committee hopes that the Recommendations in this Report will be implemented by the professionals in the child welfare and administration of justice systems so that the necessary decisions, as a last resort, are made within the legislated time zones.

(b) The Legislated Time Zones

In brief, the legislated time zones are:

Child and Family Services Act

1. Twenty-four Month Rule (s. 70 CFSA)

   The court shall not make any order concerning a child that will result in continuous temporary care exceeding twenty-four months from apprehension.

2. **Five Day Apprehension Rule (s. 46 CFSA)**

Within five days of apprehension and within twenty-four hours of open temporary detention, an apprehended child shall be brought before a court.

3. **Thirty Day Adjournment Rule (s. 51 CFSA)**

A court shall not adjourn a hearing for more than thirty days unless all parties are present and the person caring for the child consents. If any of them do not consent, the court shall make a temporary care and custody order when a hearing is adjourned.

4. **Fixing a Hearing Date (s. 52 CFSA)**

Within three months after the commencement of the proceeding, a court shall fix a date for a hearing to determine whether a child is in need of protection.

5. **Assessment Report (s. 54 CFSA)**

An assessor is required to make a written report of an assessment to the court "within the time specified in the order, which shall not be more than thirty days, unless the court is of the opinion that a longer assessment period is necessary".

6. **Plan for the Child's Care (s. 56 CFSA)**

A Children's Aid Society shall include in the plan for the child's care an estimate of the time required to achieve the purpose of the society's intervention.

7. Twelve Month Society Wardship Rule (s. 57 CFSA)

A supervision order or a society wardship order combined with a supervision order, shall not be longer than an aggregate of twelve months.

8. Six Month Status Review Rule (s. 64 CFSA)

Except for exceptional circumstances, there shall not be a status review by anyone other than a Society, within six months of the disposition order.

9. Six Month Restraining Access Rule (s. 80 CFSA)

An order restraining a person's access to a child shall not be in force for more than six months.

10. Six Month Foster Parent Rule (s. 39 CFSA)

Foster parents are entitled to notice of the proceedings and party status after caring for a child continuously during the six months immediately before the hearing.

11. Two Year Foster Parent Rule (s. 61 CFSA)

Foster parents are entitled to not have a child removed by a Society after the child has lived with them for two years, without ten days notice, and the right to a review by the Society and thereafter to a Director.

Children's Law Reform Act (s. 26 CLRA)

The court clerk or local registrar is required to list the custody/access proceeding for the court if no hearing has been heard within six months of the commencement of the proceedings, and the court "shall fix the earliest date, that in the opinion of the court, is compatible with a just disposition of the application".

17. DOCUMENTATION AND IDENTIFICATION OF PARTIES

The timely gathering of information and preparation of affidavits, reports and assessments is important. Their preparation is the responsibility of the parties and their counsel who must complete and serve the documents prior to the hearings of the applications and trials.

(a) Assistance to Parents Unrepresented by Counsel

Some parents are unable to read and write. Some have difficulty in understanding the statutory documentation and practice requirements expected of them. Without counsel, some of them experience difficulty with the expectations of the court and the legislated time zones. The Committee is of the view that parents who are not represented by counsel, should receive both written and oral information "at the counter" of the court when launching or responding to a court application. They should receive some assistance as to how to complete the documentation and arrange for service. The administrative staff and duty counsel deployed by the Ontario Legal Aid Plan at the court locations, should be knowledgeable about the local professional resources available to assist unrepresented parties. It may be helpful to designate an administrative staff person away

from the counter to communicate with the potential litigant in some privacy and not tie up other business being conducted at the counter. Ideally, unrepresented parents should be encouraged to retain independent counsel.

(b) "Answer" in Child Protection Proceedings

Unlike custody/access cases, in child protection proceedings, parents are not required to file an Answer or Statement of Defence in response to the allegations of the Society. A written response would assist the court to narrow the issues at the beginning of the process. What, therefore, should happen if a party fails to prepare, issue, serve and file an "Answer"? In custody and access cases, the courts usually allow parties to file a Statement of Defence or Answer and Counterpetition at any time in the proceedings subject, of course, to any order about costs. In child protection hearings, a rule should be established so that if no Answer is filed, the parties would be deemed to admit the facts established in the application without the necessity of calling evidence at the time of the hearing. If the parent attends at the hearing without having filed an Answer, the court should have the ability to (a) proceed with the trial without the necessity of the Society calling evidence and allowing the parent to give evidence and be cross-examined; (b) allow the Society to call evidence in response to

any issue raised in the evidence offered by the parent; and (c) adjourn the trial on such conditions as may seem just to allow the parent to file an Answer and to prepare for trial.

(c) Identification of Parties

Some Societies experience difficulty in identifying who should be included as parties to a proceeding, e.g. an aboriginal band representative or a father who disputes or claims paternity. The Committee is of the view that the judge at the first case conference should review the documentation carefully to make sure that the technical requirements of the legislation, especially the identification of all proper parties, have been completed.

(d) Service of Documentation

The documentation must be served on all parties before an interim temporary order for the care, custody and access of a child may be made, and, of course, before any other hearing, including a trial. Service of the documents upon persons who have no known fixed address or who are evading service, can be extremely difficult. Substituted service may be ordered in accordance with the rules of the courts. The Committee urges that service requirements be reviewed carefully at the first case conference.

(e) **Discovery of Documentation**

At the first case conference, the exchange of information and documentation should be encouraged. In custody and access cases, formal discoveries under oath, affidavits on production and financial statements are permitted by the rules of civil procedure. In the Ontario Court (Provincial Division) formal discovery and affidavits on production are not prescribed. Although the Committee did not study the existing rules nor the proposed rules for proceedings in the new Family Court, the Committee is of the view that formal discovery under oath of the parties should only be allowed with leave of the case management judge in both child protection and custody/access proceedings.

RECOMMENDATION #12

Documentation, Disclosure, Necessary Parties, Pleadings, Discovery and Independent Counsel, Need Early Clarification

(a) That a Rule of Practice should require an early case conference involving the parties and their counsel to review all documentation required by the court for a full disposition of the proceedings and to determine whether all parties have been properly identified and served with the application and supporting documentation.

(b) That in child protection proceedings, the Rules of Practice should include a requirement that all parties in opposition to the applicant, prepare, serve and file within ten days of service of the application, an Answer or response to the allegations in the application. The legal consequences for failing to do so should be the same as those found in custody and access cases.

(c) That the Rules of Practice in both custody/access and child protection proceedings should provide for the earliest and fullest exchange of information among the parties and not allow for formal discovery under oath of the parties except with leave of the case management judge.

(d) That the Attorney General direct the Assistant Deputy Attorney General (Courts Administration) to educate and train administrative staff at the court locations where court documents are issued and filed, about the requirements expected of parties and their counsel to comply with the Rules of Practice and practice directions issued by the courts. They should recommend to parties who are unrepresented by counsel, to retain health professionals and others who are skilled at assessment, mediation, and alternate dispute resolution, and to seek out independent counsel of their choice through the Law Society of Upper

Canada referral service and the Ontario Legal Aid Plan, including, on an emergency basis, lawyers who accept a "green form" for four hours of legal advice without the necessity of qualifying for a legal aid certificate.

18. ADJOURNMENTS AND THE LENGTH OF TRIAL

Courts should be able to fix a hearing date or trial date within the legislated time zones. The experience of the pilot case management projects is that case management reduces the number of interlocutory motions and unnecessary adjournments. The time of judges, lawyers and administrators, therefore, should be freed up by case management to prepare for and hear trials in an expedited fashion.

The granting of adjournments should be carefully scrutinized by the judges. For example, the twenty-four month rule about children in continuous care can be extended beyond twenty-four months if the court adjourns a status review hearing. In other words, s. 70 (3) (b) CFSA permits an order being made after twenty-four months if the status review is adjourned within the twenty-four month time zone.

The Committee also was concerned about the practice in the Ontario Court (Provincial Division) of commencing and hearing trials adjourned over extended interrupted periods of time. Some of the most serious cases involving children in limbo require ten trial days or more. The Committee strongly believes that once a trial has commenced, it should be completed. Case management of family law

proceedings narrows the issues by encouraging, for example, the filing of agreed statement of facts or by focusing the examinations and cross-examinations of witnesses upon the narrowed issues. In this way, the length of trials and, more importantly, the estimated length of trials, should shorten. It should prevent the scheduling of hearing trials to a more distant date depending on the estimated length of them.

RECOMMENDATION #13

No Adjournment of Trials Underway

That the Chief Justice of the Ontario Court (General Division) and the Chief Judge of the Ontario Court (Provincial Division) schedule the rotation of judges hearing family law cases throughout the province so that once a trial about the care, custody and access of a child commences, it is finished and not adjourned for further evidence at a later date.

19. CASE MANAGEMENT

One of the tenets of case management is that the judge who becomes seized of the case at the outset and who manages it to the eve of trial, will not hear the trial. The Committee thinks it should not be difficult to schedule fixed trial dates to be heard by another judge. In other words, at any point in time, each family law judge will manage some cases and preside at trial over other cases.

Case management is an onerous duty. The administrative details and the intensity of case conferences, settlement meetings and pre-trials, are exacting. The Committee suggests that the Chief Justice of the Ontario Court (General Division) and the Chief Judge of the Provincial Division, assign judges to family law cases whose aptitude and expressed interest are suited to case management. Judges should be placed in a rotation to hear trials within their own Court Region and, if necessary, across the province.

The Committee senses that the vast majority of judges are committed to case management. It would be of assistance to judges to receive a clear direction in the Rules of Practice and practice directions so that the parties and their counsel know that they are expected to comply

with the procedures within the time zones prescribed. In this way the experience for judges will be more meaningful and rewarding.

(a) Pilot Case Management Projects

The pilot case management projects in Windsor, Sault Ste. Marie and Toronto over the past two years are completed. As a result, all cases are now being case managed in those areas. It is reported in the August 1994 "Court Reform Update":

> The Toronto Civil and Family Case Management Advisory Committees have recommended the establishment of an Ontario Case Management Advisory Committee (Civil and Family). This committee, which is currently being assembled by the Joint committee on Court Reform, will have representatives from each of the three case managed sites as well as from all of the regions in the province that do not presently have a Case Management project in their area. It is hoped that it will be broadly based and representative of the diversity of the province with representatives of the Bench, Bar and Ministry.
>
> The function of the Ontario Case Management Advisory committee will be to:
>
> - Consider the recommendations of the Steering Committee and develop further the principles that would apply to an Ontario Case Management system;
> - In the case of Family law, it would work towards the development of a single set of Case Management Rules;
> - Promote communication among the case managed sites and co-operation among Bar, Bench and Ministry;

- Assist willing Courts to opt into Case Management, using the resources of the Communications and Education Subcommittees to pass on the experience of existing sites.

Our Committee welcomes this initiative.

Judge Mary Jane Hatton and Jane Long, a lawyer with the Metropolitan Toronto Children's Aid Society, in a presentation to the Committee, demonstrated that case management has become a powerful tool to combat lethargy in the legal process. Much of what the Committee has commented upon throughout this Report, arises out of practices developed as a result of case management techniques in the three locations and in Hamilton, e.g., the recommendation to file an Answer in child protection cases, restricting the use of cross-examination and discovery, case conferences, pre-trials, and the timely preparation, serving and filing of documentation. The progressive results of the pilot projects could not have been accomplished without the cooperation of the Bench, Bar and the Ministry of the Attorney General. Through committees, they worked out the logistical problems ranging from technology and procedures, to a firm understanding of the enabling legislation and substantive case law thereunder.

(b) Early Judicial Intervention

There is no question, therefore, that early judicial intervention by a case management judge facilitates the settlement of cases and the timely fixing of trial dates. As discussed previously, those cases in which Assessment Reports and child care plans are available at the outset, have a better chance of earlier resolution or final disposition.

(c) Compel Decisions by Parties and Lawyers

Another key component of case management, in the opinion of the experts (including John McMahon, the executive assistant to Chief Justice R. Roy McMurtry, who made a presentation to the Committee and who, prior to his present position, studied how to overcome delays in the criminal justice system as the result of the Askov case), is to compel lawyers, on behalf of the parties, to come to grips with the facts and issues early in the court process rather than proceeding at the traditional pace of doing so only when the hearing of the trial is imminent. Scheduled events established by the Rules of Practice, practice directions and interim orders, require lawyers, after consultation with their clients, to make decisions which may resolve the matter completely or which will further narrow the outstanding issues and steps needed to either conduct or shorten the duration of a trial or to ultimately settle the case.

(d) **Protocol of Expectations**

Early disclosure, exchange of information and mandatory case conferences/pre-trials, are essential ingredients to reducing the backlog of cases set for trial. In essence, judges, lawyers and administrators should clearly know "the protocol of expectations" required by the administration of justice from the time of the child's apprehension or commencement of the application, to the final disposition at trial.

(e) **Case Management and Technology at 311 Jarvis Street, Toronto**

Judge Mary Jane Hatton advised the Committee that as a result of case management, the number of appearances in court by counsel and the time taken to settle cases which were capable of settlement, were cut in half. Three day trials were being heard by the end of three months from the date being fixed for trial. The length of trials were shortened and there were fewer ten days trials. She also advised that the introduction of local area networks of personal computers, fax machines and the better use of the telephone system by all persons involved in the process - judges, lawyers and administrators - led to better communication. There was no necessity for court attendances by the parties or their counsel who needed routine orders prepared, signed, issued and delivered. With the assistance of technological

resources made available by the Ministry of the Attorney General, the time to commence and accomplish a step in the process, has been significantly reduced.

(f) "Co-Managers"

Another key factor to the success of case management is the approach of the judges, lawyers and administrators who consider themselves as co-managers of the administration of justice. Each of them think of each other as an equal participant. The chair of the local case management committees rotate from partner to partner; sub-committees skilled and knowledgeable in various fields of expertise, are established and report to the case management committee. The meetings are "open" and receptive to everyone's point of view, from clerk-typist to law clerk to judge.

The case management committees, therefore, should become the "hub of the wheel" driving the timely and efficient disposition of family law cases. Eventually, provincial consistency will be achieved through the use of uniform Rules of Practice and practice directions that support case management and the time zones enacted by the legislation and prescribed by the Rules of Practice.

Ideally, if this approach is taken by the judges, lawyers and administrators in the administration of justice, the only cases which should proceed to trial will be those in which there are insufficient resources within the local community health and child welfare systems to address the behavioral problems and inadequate parenting skills exhibited by members of families whose children are climbing the disturbance scale. In practice, this will be difficult to accomplish. However, it should be the goal of both systems that the reasons for judgment issued by a judge after a trial or hearing should become a litmus test as to how well the health and child welfare systems are performing on behalf of children in limbo.

RECOMMENDATION #14

Establish Ontario Case Management Advisory Committee

That the Chief Justice of the Ontario Court (General Division) and the Chief Judge of the Ontario Court (Provincial Division) and the Attorney General establish the Ontario Case Management Advisory (Civil and Family) to develop case management for all family law cases throughout the Province of Ontario.

20. PROVINCIAL CONSISTENCY

The Committee is fully aware that the eight court regions and the various court locations within them, have developed local practices and expectations which vary in Ontario. It is hoped that with the review by the Ontario Law Reform Commission of the Child and Family Services Act and the establishment of the Ontario of Case Management Advisory Committee (Civil and Family), a new body of knowledge and experience will test the Recommendations in this Report. The Committee hopes that our Recommendations will assist the Chair of the Ontario Law Reform Commission, the Chief Justice of the Ontario Court (General Division), the Chief Judge of the Ontario Court (Provincial Division) and the soon to be appointed Associate Chief Justice of the Family Court of the Ontario Court (General Division), to prepare their own recommendations about the legislation, Rules of Practice and practice directions. In this way a consistent "protocol of expectations" will become available and meaningful to all members of the public, families, and health and social work professionals across the province. Everyone should know what is expected of them when, as a last resort, they seek out the administration of justice in Ontario to obtain timely decisions about the future care, custody and access of children in limbo.

21. PARALLEL PROCEEDINGS CFSA AND CLRA/DIVORCE ACT

When the new Family Court is established, there will be an opportunity to include General Division divorce actions in parallel Provincial Division child protection and custody/access proceedings. At present, except in the Unified Family Court in Hamilton, this cannot be accomplished. Unfortunately, there has been a long history of jurisdictional "skirmishes" between the federal and provincial court systems. The rule is that child protection proceedings take precedence over custody/access cases launched under the Divorce Act or the CLRA. The reason for the 'rule' is that the protection of the child is of more importance. If a society wardship order is issued, the custody and access action becomes meaningless and is "stayed" pending the return of the child to either parent and the Society withdraws from the situation.

There are many cases in which child protection concerns arise during custody/access and divorce actions. Allegations of violence and abuse can paralyze court proceedings. In some cases, Children's Aid Societies, after investigating the allegations, decline to act by not offering voluntary services or even launching an application. This leaves many families in what they perceive as an untenable situation.

The abused spouse and children are left to their own devices with or without the assistance of counsel, to obtain restraining orders preventing access and, if indicated, supervised access orders to curtail or restrict access by the child to the allegedly abusing spouse. Some Children's Aid Societies provide some services to support the family, including supervised access, to prevent an escalation of violence or negligence to the level of placing the child "in need of protection". However, those Societies are rare.

When a family in dysfunction or in extremis launches proceedings for divorce and a resolution of their personal and property rights issues in accordance with the Divorce Act, Family Law Act and the CLRA, the Children's Aid Society usually allows the family law civil system of justice to adjudicate the abuse allegation. Of course, if abuse or neglect is reported, an investigation will be launched by the Society. In some cases, the Society takes the position that the children are not technically "in need of protection" because they are in the custody of the non-offending parent even though the facts may be quite serious. This approach is not so prevalent if there is no parallel proceeding.

When viewed through the eyes of a child, there is no difference between the assaultive or neglectful behaviour of a parent identified

in a child protection proceeding or in a custody/access case. Ideally, all children wish that their parents would cease their abusive or neglectful behaviour, reconcile and provide, together, a secure and permanent environment for them. They know that when this cannot be accomplished quickly, some other person, such as foster parent or one of their parents will look after them. Although this may be a frightening prospect for some children who want to return home, what they want and need is some permanency in their lives.

The Committee is of the opinion, therefore, that an expanded unified family court system has an opportunity to encourage child protection and custody/access proceedings to run in a concurrent and parallel fashion when an allegation of abuse is made. Both actions could be decided on one set of facts. The trials and all interlocutory matters could be heard together. Through user and advisory committees composed of local community resources, the court will also be able to communicate with the Children's Aid Society about the Society's intervention policy concerning custody/access cases.

22. OPEN ADOPTION

It is difficult for judges to permanently deny access of a child to natural parent(s) or primary caregiver(s). The evidence supporting such a decision must be convincing. The Committee has become aware that some Societies have entered into sophisticated agreements in writing with natural parents and foster parents to allow access after adoption. In this way some difficult cases have been settled. On occasion, without knowledge of the agreement, some judges have been requested, on consent of the parties and the child's counsel, to order crown wardship without access. Having said this, the Committee is reluctant to offer a substantive recommendation about "open adoption" because it is a public policy issue of great importance and beyond the Terms of Reference.

RECOMMENDATION #15

"Open Adoption" Should be Reviewed

That the Ontario Law Reform Commission in its review of the Child and Family Services Act, study the issue of "open adoption" and make a recommendation to the Attorney General about whether the Act should be amended to recognize the need for "open adoption" in special circumstances such as when an older child who has specific positive

memories of his or her natural parents, requires access to them to retain cultural ties or to diminish any further behavioral symptoms which prevent the healthy maturation of the child.

23. EDUCATION AND TRAINING

Needless to say, the Committee is urging both private and public sector institutions to provide adequate education and training programs to all persons within the child welfare and administration of justice systems. Everyone should learn more about both systems and their accountability. They should become more aware about the resources available to them to ensure timely decisions on behalf of children in limbo. This group should include the policy makers and supervisors of the Ministry of Community and Social Services who supervise local Children's Aid Societies responsible for the deployment and actions of their social workers and lawyers.

RECOMMENDATION #16

Education and Training by Social Justice Services Division

That the Attorney General provide resources to the new Social Justice Services Division to coordinate and provide to all persons involved in the delivery of services in the child welfare and administration of justice systems, adequate and regular educational and training programs to be delivered by public and private institutions in the fields of law, health, education and social services.

24. ACCOUNTABILITY

Systemic accountability is the hallmark of the Committee's Recommendations. Without accountability to the public, to families and especially to children in limbo, little may be accomplished.

(a) Judges

If members of the public and their counsel have any concerns about delay within the administration of justice involving the care, custody and access of their children, they should address their concerns to the Regional Senior Judge of the court region in which their case is being heard.

The Committee also urges the Regional Senior Judges to rotate judges into and out of family law cases, based upon the abilities and expressed interest of the judges for the unique nature of the work. It is understood that stressful and emotional aspects of the duties require patience, understanding, listening skills, assertive action and an ability to assess in a timely manner the facts about the needs of a child and the ability of the parent(s) or intended caregivers to attend to those needs.

(b) Lawyers

The Law Society of Upper Canada certifies lawyers who qualify as family law specialists. The Law Society's Rules of Professional Conduct address the relationship of solicitor and client and the general duty of a lawyer to respond in a timely way to the legal requirements and instructions of a client. Any person, including judges, may communicate with the Law Society about a lawyer's delay. To control the conduct of counsel, the courts have sanctions such as contempt and punitive costs. In short, judges, administrators, and clients require lawyers who are timely, prepared, not overbooked and who are keenly aware of the resources found in both the child welfare system and the administration of justice.

(c) Official Guardian

Any person, including a judge, is encouraged by the Official Guardian to address concerns about delays. The Official Guardian has published a Policy Statement about the "Role of Child's Counsel" in proceedings involving children. It is a special role which focuses upon a unique and special solicitor-client relationship. Child's counsel not only owes a duty to the child but, also, to the court and the parties as to the timely marshalling of the evidence and the presentation of the views, preferences, or wishes, of the child, if any.

(d) Ontario Legal Aid Plan

Any lawyer in Ontario is entitled to represent clients who are legally aided by the Plan. In order to reduce mounting costs in some cases, the Plan has a system of mediating family law disputes in an effort to facilitate the settlement of the case. As a pilot project in Kitchener-Waterloo, Middlesex and Simcoe, the Plan also issues a "green form" to members of the public who require emergency four hours of legal advice without the necessity of issuing a legal aid certificate.

A suggestion was made to the Committee that judges should advise the local Legal Aid Director of any endorsement made on the court record about the results of a case conference, pre-trial or trial which show that a lawyer or legally aided client has been totally unreasonable in response to certain suggestions or timeliness expected of them. Although this suggestion was endorsed by Bob Holden, the Director of OLAP and a member of the Committee, it was made in the hope that the local Legal Aid Director would withdraw a legal aid certificate. Some litigants have no justification for being in court. Some have little likelihood of success. However, the Committee is of the view that the judges possess other sanctions, and it is clear that because of the special importance of child protection cases, the Plan should provide a legal aid certificate even though there is little likelihood of success.

(e) **Courts Administration**

The Courts Administration Division of the Ministry of the Attorney General is administered in the eight court regions of the province. Performance reviews are carried out regularly by supervisors who administer the court system. If anyone has a complaint or recommendation about delay and procedures, the Regional Manager of the court region will respond. The Assistant Deputy Attorney General (Courts Administration) is responsible to the Deputy Attorney General.

(f) **Courts Management Advisory Committees**

The Ontario Courts Management Advisory Committee and the eight Regional Courts Management Advisory Committees established under the Courts of Justice Act, are forums in which the public, the judges, courts administrators, and lawyers may identify, consider and develop solutions to systemic concerns, including delay, arising within the administration of justice.

RECOMMENDATION #17

Availability of Emergency Legal Advice

That the Ontario Legal Aid Plan consider expanding the use of "green forms" to other areas of the province so that more members of the public are able to have access to emergency legal advice about family law.

RECOMMENDATION #18

Briefing of Courts Management Advisory Committees

That the Ontario Courts Management Advisory Committee and the Regional Courts Management Advisory Committees be briefed about the Recommendations in this Report and be requested by the Attorney General to give clear guidance, advice and direction to the proposed Ontario Case Management Advisory Committee (Civil and Family) and to local case management and court liaison committees about the Recommendations in this Report.

25. STATISTICS

It would be helpful to assemble relevant statistics as indicators of delay or timeliness of the steps and procedures in family law cases. The statistics should establish a foundation for assessing how well the child welfare and administration of justice systems together are performing. Properly structured, such indicators will be a significant management tool to advise the judges, administrators and lawyers of compliance with the legislated time zones and the Rules of Practice.

RECOMMENDATION #19

Develop Statistics for Management of Timeliness of Child Proceedings

That the Attorney General provide resources to the Assistant Deputy Attorney General (Courts Administration) to develop computer programming which will provide detailed information in a statistical form for the management and analysis of the steps and timeliness of proceedings involving the care, custody and access of children.

26. DIRECTORS' REVIEWS

By s. 66(1) CFSA, a Director appointed by the Minister of Community and Social Services "shall, at least during each calendar year" review the status of a crown ward who has been a crown ward continuously for the preceding twenty-four months and whose status has not been reviewed by a court under a status review. The Committee did not receive any information as to how often this happens. The section appears to be a "fail safe" mechanism to ensure that the child welfare system is working in a timely way.

By s. 144 CFSA, a Director may review a Children's Aid Society's refusal to place a child for adoption with a person, including a foster parent, who is caring for the child. By s. 145 CFSA, a Director must also conduct a review when no order for adoption is made after a year has expired, or the adoptive placement has broken down. This is a further indication of the importance of securing an early permanent home for a child.

The Committee understands that there are no rules governing the procedure of a Director's review. The process is outside of the formal administration of justice. Some reviews have been very lengthy and

costly. The results of some of them have not been made known to interested participants in the administration of justice. It is argued that some reviews have been time consuming and have contributed to limbo. Given the intent of the Recommendations in this Report, the Committee asks whether, for example, the Official Guardian should represent crown wards who have not been placed for adoption in a timely way? Should the Official Guardian request a judge rather than a Director to conduct a review in accordance with the rules of court? The Committee believes that this problem requires special attention.

RECOMMENDATION #20

Review Policy Behind Directors' Reviews

That the Attorney General consult with the Minister of Community and Social Services about the policy behind Directors' Reviews and whether one of the recommendations should be that they should be conducted within the administration of justice.

27. DEVELOPMENTAL AGES AND STAGES OF CHILDREN

In its wording, the CFSA does not recognize the developmental ages and stages of children as they grow to maturity. The Act does not refer to infants, toddlers, pre-schoolers, early schoolers, pre-teens and teenagers. Doctors Steinhauer and Wilkes reminded the Committee of the needs of children as they mature. A younger child requires more security and direct nurturing care. An older child requires support to take risks towards the acceptance of responsibility. Young children are better candidates for adoption. Older children are more flexible in their acceptance of more than one set of parents. Some children have positive memories of their earlier primary caregivers and may need to deal with their memories at puberty when they are searching for their identities and cultural backgrounds.

For these reasons the Committee is of the view that children under the age of three at the time of apprehension should be placed on a faster track towards adoption than older children. Other jurisdictions recognize the importance of a speedier resolution for a young child. In the Yukon it is age two, in Nova Scotia it is age six, and in Manitoba it is age five. The Committee does not understand the reasoning behind the differences in age in the various jurisdictions and admits

that the choice of the age of three is somewhat arbitrary. However, it should be recognized that at age three the child is beginning to remember events and especially primary caregivers.

RECOMMENDATION #21

Amend s. 30, CFSA: Reduce Twenty-Four Month Rule to Twelve Months for Children Age Three or Younger

That the Attorney General request the Minister of Community and Social Services to amend s. 70 of the Child Family Services Act to reduce the twenty-four month rule to twelve months for children apprehended at age three or younger.

28. CONCLUSION

Children drifting further into limbo have the right to expect that all professionals involved at the intersection of the child welfare and administration of justice systems will expand their professional viewpoints to accept the strengths and roles of each other. All have something to contribute to the "best interests" and protection of children.

Systemic mechanisms such as case management, the preparation and exchange of information, the production and delivery of interim and full Assessment Reports, and the establishment of protocols among the criminal justice, social welfare, health, education and family law systems, are vital to help professionals coordinate their efforts on behalf of children.

When child protection and custody/access cases enter the administration of justice, the courts must have in place a protocol of expectations. The courts must encourage parents, caregivers and professionals to respond meaningfully and expeditiously. The legislated time zones and the times established in the Rules of Practice

must be complied with. Underneath it all, the timeliness inherent in a protocol of expectations is essential to the "best interests" of children.

Once a finding of "in need of protection" is made or an allegation of abuse or negligence has been proven, there is no requirement at law to relitigate the acrimonious historical facts at any subsequent hearing; the only consideration for the parties and the courts is to determine what order for the care, custody and access of a child is in the best interests of the child.

By vigorously enforcing the expectations of the law, the courts will send out a signal to all professionals and parents that they should quickly focus upon the needs of the child and the ability of the child's parents to respond to those needs. For example, the courts must expect a finding about "in need of protection" within thirty to sixty days of apprehension so that all professional information, particularly assessments and child care plans, may be received prior to making a final disposition order within five to six months of the apprehension.

The judiciary should adopt the approach that Assessment Reports and plans for the child's care be produced at or near the beginning of a

court case. The Reports and plans may be updated as circumstances change.

The judiciary should not change the direction of a continuous care child - either adoption or returning home without supervision - more than once. To do otherwise may defeat the rule which requires a final disposition within twenty-four months of the apprehension of a child in continuous temporary care.

The Committee believes that if the Recommendations in this Report are implemented, there will be fewer children drifting into limbo, and the lethargy in the child welfare and administration of justice systems will diminish substantially.

ENDNOTES

1. Justice David M. Steinberg, Senior Justice of the Unified Family Court, Ontario Court of Justice, states:

THE HONOURABLE MR. JUSTICE D. M. STEINBERG
SENIOR JUSTICE
UNIFIED FAMILY COURT
ONTARIO COURT OF JUSTICE

L'HONORABLE JUGE D. M. STEINBERG
JUGE PRINCIPAL
COUR UNIFIÉE DE LA FAMILLE
COUR DE JUSTICE DE L'ONTARIO

UNIFIED FAMILY COURT
55 MAIN STREET WEST
HAMILTON, ONTARIO L8P 1H4

(416) 577-8318

March 6th, 1995

I wish to thank the Official Guardian for his efforts in trying to reduce the delay that sometimes occurs in dealing with the few wardship cases that end up having to be litigated in our family courts.

I am in agreement with virtually all of the recommendations in this report; taken together they would represent a concerted attempt by the judiciary, the Bar, the Ministry of the Attorney General and the helping professions to resolve disputes over the needs of children in an expeditious and fair way. I am, however, very concerned that the end result of this report may be to concentrate on speedily resolving these cases in the court room, without the availability of the necessary additional mediation, assessment, social work and judicial resources recommended in this document. That would be wrong.

At present, some, although not all of the delays in our courts relating to the resolution of childrens' issues are the result of the absence of the very resources that this report advocates for. To rush cases forward to trial without these resources being in place will engender feelings of unfairness about the legal system by the family members it is supposed to be assisting; in the end more cases will be contested, the courts will be overwhelmed and further delays will be unavoidable.

I consider all of the recommendations in this report as necessarily inter-related.

Yours very truly,

David M. Steinberg
Senior Justice

DMS/mb

2. Catholic Children's Aid Society of Metropolitan Toronto v. M.(C) [1994] 2 S.C.R. 165

3. Ibid

4. The Least Detrimental Alternative: University of Toronto Press 1991 at page 209, Dr. P. Steinhauer.

5. Vol. 3 Canadian Journal of Family Law page 165: Joan Tator and Katherine Wilde

6. The new Social Justice Services Division of the Ministry of the Attorney General is composed of the Public Guardian and Trustee, the Children's Lawyer (formerly the Official Guardian), the Family Support Plan, the Accountant of the Ontario Court, and the Supervised Access Program (the proclamation date for the new legislation about substitute decision making is April 3, 1995). The Division is headed by the PG & T. Each program maintains jurisdictional independence as provided for by law. The clustering of the programs will assist the Ministry to plan the delivery of professional services on behalf of the vulnerable in a more efficient and meaningful way.

- It is of crucial importance therefore that a final decision and reasons for judgment be issued in a timely manner so that all interested persons (including family and Children's Aid Societies) obtain a clear determination about the child's future.

2. PURPOSE OF THE REVIEW

- Families and alternate caregivers experience delays in proceedings under the Child and Family Services Act and the Children's Law Reform Act. The most profound impact of delay is upon the child(ren) who are the focus of the proceedings.

- The purpose of the review is to ascertain and analyze the key issues and procedures which lead to and result from delay so that recommendations are made which will assist in the more timely administration of the proceedings within the court system.

- Current initiatives, such as case management in both Divisions of the Ontario Court and the procedures for an expanded Unified Family Court, should be canvassed and understood to assist the Committee in fulfilling its purpose.

3. KEY ISSUES

- **In analyzing the statutory time limitations, it may be established that some of them contribute to delay or are unrealistic within the ability of the court system to respond to the various interests being presented to the courts on behalf of children, parents, foster parents, Children's Aid Societies and other interested persons who may be entitled to party status. Recommendations as to changes in the legislation (CFSA and CLRA) and the Rules of Practice in the courts would be helpful so as to balance the needs and "best interests" of children with the ability of the courts to respond in a meaningful way.**

- **A review of judicial comments and specific case examples would assist in understanding the consequences of delay in relationship to the purposes of the legislation (CFSA and CLRA) and the role of the judges who are faced with, at times, unrealistic time limitations as to the progress and final determination of a case. It is important that all interested persons have confidence in the judicial system to balance in a timely way the various legal positions being presented by the parties about children.**

APPENDIX 'B'

MEMBERS OF THE COMMITTEE

Willson A. McTavish - Chair
Official Guardian
Office of the Official Guardian
Ministry of the Attorney General
Toronto

Debra Paulseth, Secretary to the Committee
Courts Administration
Ministry of the Attorney General
Toronto

Mr. Justice David Steinberg
Senior Justice
Unified Family Court
Hamilton

Judge Grant A. Campbell
Ontario Court of Justice
(Provincial Division)
Guelph

Judge Louise L. Gauthier
Ontario Court of Justice
(Provincial Division)
Sudbury

Judge J. Wilma Scott
Ontario Court of Justice
(Provincial Division)
St. Catharines

Lorraine Martin
Clinical Co-ordinator of Social Work
Office of the Official Guardian
Ministry of the Attorney General
Toronto

Robert Beaudoin
Courts Administration
Ministry of the Attorney General
Toronto, Ottawa

Rachele Dabraio
Project Manager, Supervised Access
Policy Development Division
Ministry of the Attorney General
Toronto

Marc Lebel
Chenier, Lebel & Moore
Barristers & Solicitors
O.G. Panel Lawyer
Ottawa

Sharmon S. Bondy
Gignac, Sutts
Barristers & Solicitors
O.G. Panel Lawyer
Windsor

Barbara E. Minshall
Barrister & Solicitor
O.G. Panel Lawyer
Kenora

Judith Beaman
Barrister & Solicitor
O.G. Panel Lawyer
Ottawa

Bob Holden
Director
Ontario Legal Aid Plan
Toronto

Gerry P. Sadvari
McCarthy, Tétrault
Canadian Bar Association (Ontario) Family Law Section
Toronto

Brian Weagant
Canadian Foundation for Children
Youth & The Law
Toronto

Cliff Nelson
Ricketts, Harris
Advocates' Society
Toronto

Dave Lovell
Chair
County & District Law Presidents' Association
Owen Sound

Dr. Alan Young
Psychologist
Thunder Bay

Anthony W. Snider
Senior Counsel
Children's Aid Society of York Region
Newmarket

Carolyn Buck
Director of Service
Children's Aid Society of Metropolitan Toronto
Toronto

John Calcott
Legal Services Branch
Ministry of Community and Social Services
Toronto

Joan Belford
Policy and Program Development
in Child and Family Services
Ministry of Community and Social Services
Toronto

Craig Perkins
Policy and Development Division
Ministry of the Attorney General
Toronto